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Selection of Leading Cases

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TRANSFER OF PROPERTY

Supplementary Cases

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TRANSFER OF PROPERTY.

Before—Mr. Justice Mookerjee and Mr. Justice Holmwood.

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v.

MOOSHAHAR SAHU.

[*Reported in I. L. R. 31 Calc. 999; 6 C. L. J. 410; 11 C. W. N. 889; Since affirmed by Privy Council: See 23 C. L. J. 406 P. C.; 20 C. W. N. 393 P.C.*]

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The judgment of the Court was as follows: —

Mookerjee and Holmwood, JJ. The circumstances which led to the litigations out of which these two appeals arise, so far as it is necessary to state them for the disposal of the questions raised before us, lie in a narrow compass, and although they were the subject of controversy in the Court below, were not disputed before us. On the 14th December 1900, the plaintiffs respondents commenced an action against Krishna Benode Upadhya, one of the defendants in these suits, for recovery of money due under a usufructuary mortgage. The plaintiffs apprehended that the defendant might alienate his properties before judgment, and made an application for attachment *pendente lite*. The application, however, proved infructuous, and was rejected on the 12th February 1901. On the 29th November following, the plaintiffs obtained a decree for a large sum of money against the defendant, and subsequently in execution of this decree attached the properties now in suit. Two claims under section 278 of the Civil Procedure Code, were preferred by two different sets of persons, who are the appellants before us; their claim was founded upon two conveyances alleged to have been executed in their favour on the 2nd September 1901 by the defendant in the suit of the ptaintiffs-respondents. The claims were allowed on the 13th September 1902. On the 12th September 1903 the decree-holders

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commenced the suits out of which these appeals arise under section 283 of the Civil Procedure Code, and in each case they asked for a declaration that the properties in dispute still belonged to their judgment-debtor and were liable to be sold in execution of their decree against him. Suit No. 73 of 1903 impeached the conveyance executed by the judgment-debtor in favour of Lala Hakim Lal; suit No. 74 of 1903 related to the conveyance executed in favour of Kamta Prosad. Both the suits were defended, substantially on the ground that the conveyances were *bond fide* and for consideration, and had consequently created a good title in the purchasers which could not be successfully impeached by the execution creditor of the vendor. As regards the conveyance executed in favour of Lala Hakim Lal, the Subordinate Judge found upon the evidence that the consideration recited in the document was genuine, but he set aside the conveyance on the ground that it had not been executed *bond fide*, and that the effect of it had been to delay, if not to defeat, the creditors of the transferor. As regards the conveyance executed in favour of Kamta Prosad, the Subordinate Judge found on the evidence that the consideration recited in the document was fictitious, and that it was a contrivance by the vendor to place the property out of the reach of his creditors. In this view of the matter, the Subordinate Judge made a decree in favour of the plaintiffs in both the suits, and declared that the conveyances were inoperative as against the creditors. The purchaser defendant in each case has appealed to this Court. The two appeals have been argued, one after the other, and we propose to deal with them separately. As regards the conveyance executed in favour of Lala Hakim Lal, which was the subject-matter of suit No. 73 of 1903 in the Court below, the question arises in appeal No. 433 of 1904. As regards the conveyance of Kamta Prosad which was the subject-matter of suit No. 74 of 1903, the question arises in appeal No. 440 of 1904. We shall take up the latter case first, because no serious argument was advanced on behalf of the appellant to show that the decision of the Subordinate Judge is erroneous. . . . . .

[Their Lordships agreed with the Subordinate Judge and dismissed the appeal.]

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As regards the conveyance executed in favour of Lala Hakim Lal on the 2nd September 1901, the Subordinate Judge has found that it was for consideration. This finding has not been assailed before this Court on behalf of the plaintiffs respondents, and after an examination of the evidence on the record, we are satisfied that it cannot be successfully impeached. The conveyance recites that the transferor Krishna Binode was indebted to the transferee, Lala Hakim Lal, to the extent of Rs. 30,309, and was also indebted to the extent of Rs. 12,347 to various other creditors whose debts are specifically set out in the document. The total amount of indebtedness of Krishna Binode at the time of execution of this document, so far as the creditors mentioned in the document were concerned, therefore amounted to Rs. 42,656, and the deed purports to convey to Lala Hakim Lal various properties in satisfaction of those debts. The purchaser was to set off against the consideration for the conveyance the debt due to himself, and the remainder of the consideration was to be left in deposit with him for payment to the other creditors, for the obvious reason that most of the debts were secured by mortgages. Now it has been satisfactorily established in the present litigation that the debts mentioned in the document all represented genuine transactions, and the learned Subordinate Judge has found that they were in reality due at the time of the execution of the conveyance. He has further found that not only has the debt due to the purchaser been satisfied by a set off against the consideration for the deed, but also that the sum left in deposit with the transferee for payment to the other creditors has been duly applied in discharge of their claims. These facts have not been, and upon the evidence on the record as it stands cannot be, controverted. The Subordinate Judge, however, has declared the conveyance inoperative, because, in his opinion, the effect of it was to give an undue preference to some out of the many creditors of the transferor. This conclusion has been assailed, on behalf of the appellants, substantially on three grounds, namely: *first*, that inasmuch as the case of the plaintiffs was that the conveyance was nominal and without consideration, and as this case has failed, they are not entitled to succeed on the ground that the transaction was in fraud of the creditors of the transferor; *secondly*, that if the action be treated as one to set aside a fraudulent conveyance under

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section 53 of the Transfer of Property Act, it has not been properly framed, inasmuch as a suit of this description can be maintained only by, or on behalf of, all the creditors of the transferor; and *thirdly*, that in any event, the conveyance is not void or voidable under section 53 of the Transfer of Property Act merely on the ground that, by means of it, preference was given to some among the many creditors of the transferor.

In support of his first contention, it has been argued by the learned vakil for the appellants that the suit was in substance one under section 283 of the Civil Procedure Code, that the object of it was to establish the right which the plaintiffs claimed unsuccessfully in the execution proceedings, and that the only ground upon which they impeached the validity of the conveyance was that it was without consideration, and a mere device on the part of the transferor to keep his property out of the reach of the creditors. It must be conceded that there is considerable force in this contention. An examination of the plaint as a whole convinces us that the suit was not framed with a view to obtain a declaration that the transfer in question was voidable at the option of the plaintiffs, because it had been made with intent to defeat or delay the creditors of the transferor. It is not necessary, however, to deal with this aspect of the case in detail; because in our opinion the appellants are entitled to succeed upon the merits.

In support of his second contention, it was argued by the learned vakil for the appellants that a suit to set aside a conveyance alleged to be fraudulent within the meaning of section 53 of the Transfer of Property Act, must be brought by or on behalf of all the creditors, and that this suit which had not been brought on behalf of all the creditors was not maintainable in its present form. In our opinion this contention is manifestly well founded. It was pointed out by Mr. Justice Telang in the case of *Burjorji Dorabji Patel* v. *Dhuu Bai* [1] that a claim to set aside a deed of settlement, on the ground that it is fraudulent and void as against the creditors, can only be enforced in a suit either filed by all, or on behalf of and for the benefit of all the creditors. The same view was adopted by Sir Lawrence Jenkins, C. J., in *Ishvar Timappa Hegde* v. *Devar*

[1] (1891) I. L. R. 16 Bom., 1, 19.

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Venkappa [1] in which it was ruled that when a creditor sues to set aside a deed executed by his debtor on the ground that the deed was voidable under section 53 of the Transfer of Property Act, the creditor can only sue on behalf of himself and all the other creditors. This view receives support from the decision of their Lordships of the Judicial Committee in the case of *Chatterput Singh* v. *Maharaj Bahadur*.[2] The question there arose as to the validity of certain transfers alleged to have been made to one Chatterput. The transfers were challenged under section 52 of the Transfer of Property Act, and it was suggested that if they were not actually void under that section, they were at least voidable under section 53 of the Act at the instance of the plaintiffs who had been eventually defeated and defrauded thereby. Their Lordships held that an issue upon such a question could be raised, and a decree could be made only in a suit properly constituted for the purpose, and that the suit as framed, which was between the purchaser on the one hand and one only of the creditors on the other, was not so constituted either as to parties or otherwise. The view, it may be observed, is in harmony with what has been regarded as the settled rule in England, where it has been held that if the settlor is alive and not a bankrupt at the time the action is brought to set aside a conveyance on the ground that it was voidable under Statute 13 Elizabeth Chap. 5, it should be by a creditor or creditors on behalf of himself or themselves and all other creditors of the settlor: see *Reese River Silver Mining Co.* v. *Atwell*;[3] see also White and Tudor's Leading Cases on Equity, 7th Edition, Vol. II, p. 882. The rule appears to us to be based upon a perfectly sound and intelligible principle. To allow one creditor to impeach the validity of a conveyance would expose the transferee to separate attacks by different creditors, each of whom might litigate the same question in a different suit, and it is not inconceivable that the Court might arrive at different conclusions in different suits brought at the instance of different creditors. We must, therefore, hold that if the present suit be regarded as commenced under section 53 of the Transfer of Property Act, with a view to obtain a declaration that the conveyance in question is voidable at the instance of the creditors of the transferor,

[1] (1902) I. L. R. 27 Bom. 143. [2] (1904) I. L. R. 32 Calc. 198.
[3] (1869) L. R. 7 Eq. 347.

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the suit has not been properly framed and is not maintainable. It was argued, however, by the learned vakil for the plaintiffs-respondents that as this objection to the frame of the suit was not taken in the Court below, it is too late for the appellants to raise it now, and that in any event, if the objection prevails, the plaintiffs ought to be allowed an opportunity to amend the plaint, so as to make this a suit on behalf of themselves and all other creditors of the transferor. It cannot be disputed that there is considerable force in this contention. Although, therefore, we must hold that the second ground taken on behalf of the appellants ought to prevail, we are not disposed to dismiss the suit on this ground alone, and we must consequently examine the validity of the third ground upon which the judgment of the Subordinate Judge is assailed.

The third ground taken on behalf of the appellant was that, as the transfer was for adequate consideration, as it was not a mere cloak for the ultimate benefit of the transferor himself, and as most of the debts which were satisfied out of the consideration for the deed were secured by mortgages, the transaction is not voidable under section 53 of the Transfer of Property Act. In support of this position, reliance was placed on the cases of *Alton* v. *Harrison*[1], *Ex-parte Games*[2], *Wood* v. *Dixie*[3], *Sundaroppa* v. *Kamayya*[4], *Tillak Chand Hindumal* v. *Jita Mal Sedaram*[5], *Rajan Harji* v. *Ardeshir Hormusji Watia*[6], *Bhagwant* v. *Kedari*[7], *Hanifa Bibi* v. *Pennamma*[8], *Mahammadunissa Begum* v. *Barkelay*[9], *Rama Samia Pillai* v. *Adi Narayana Pillai*[10]. It was contended on the other hand by the learned vakil for the plaintiffs-respondents that it was not enough to examine whether the conveyance which is the foundation of their title was for consideration, but that the Court must also investigate whether or not it was *bona fide*, and in support of this proposition reliance was placed upon a passage from the judgment of this Court in the case of *Isham Chunder Das Sarkar* v. *Bisha Sirdar*[11].

[1] (1868) L. R. 4 Ch. 622.
[2] (1879) 12 Ch. D. 314.
[3] (1845) 7 Q. B. 892; 68 R. R. 580.
[4] (1896) 8 Mad. H. C. 231.
[5] (1873) 10 Bom. H. C. 295.
[6] (1879) I. L. R. 4 Bom. 70.
[7] (1900) I. L. R. 25 Bom. 302.
[8] (1903) 27 Mad. L. J. R. 11.
[9] (1905) I. L. R. 29 Bom. 438.
[10] (1897) I. L. R. 20 Mad. 405.
[11] (1867) I. L. R. 24 Calc. 825.

We are of opinion that, in order to establish the validity of a conveyance impeached as fraudulent on creditors, it is not enough to prove that it was for consideration: it must also be proved that it was made in good faith. The question, however, remains under what circumstances may a transfer be said to have been made in good faith: to determine this, we have to consider the provisions of section 53 of the Transfer of Property Act. That section, in so far as it applies to the present case, provides that every transfer of immovable property made with intent to defeat or delay the creditors of the transferor is voidable at the option of any person so defrauded, defeated or delayed; but this does not impair the rights of any transferee in good faith and for consideration. The section, as is well known, is founded upon Statute 13 Eliz. Ch 5, although there has been some divergence of judicial opinion as to how far the Indian law as comprised in section 53 of the Transfer of Property Act was intended to vary from the English law as laid down in the Statute of Elizabeth: *Bhagwant* v. *Kedari* [1], and *Ishan Chunder Das Sarkar* v. *Bisha Sirdar* [2], the former of which supports the view that the section under consideration did not alter the pre-existing law governing these matters, and the latter supports the view that although the Statute of Elizabeth forms a substantial part of the groundwork of sec. 53, its language is different, and the Indian Code goes much further than the English Statute. One point, however, is fairly beyond the domain of controversy. The third paragraph of section 53, which lays down that nothing contained in the section shall impair the rights of any transferee in good faith and for consideration, is based upon Stat. 13 Eliz. Ch. 5, sec. 6, which protects transfers made "upon good consideration and *bond fide*." We may take it therefore that the Legislature when it used the words 'good faith' in sec. 53, did not intend to depart from the interpretation which had been put upon the term *bond fide* in the Statute of Elizabeth. Reference to English authorities under these circumstances is not only legitimate but essential; as was observed in *Mowell* v. *Reg.* [3], if a statute upon which a particular construction has been long put is re-enacted *ipsissimis verbis*, this construction must be considered

[1] (1906) I. L. R. 25 Bom. 202. [2] (1907) I. L. R. 34 Calc. 823.
[3] (1857) 8 E. & B. 54, 73; 27 L.J., M. C. 4.

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to have the sanction of the Legislature. Likewise, if Acts are framed using the forms of words or clauses in prior Acts which have received judicial construction, unless a contrary intention appears, the Courts will presume that the Legislature has adopted the judicial interpretation, or has used the words in the sense attributed to them by the Courts, this view is amply supported by the observations of James, L.J., in *Ex parte Campbell*[1], and of Lord Coleridge, C.J. in *Barlow v. Teal*[2], and is in no way inconsistent with the rule laid down in *Bank of England v. Vagliano*[3] and *Ajodhya Nath Sen v. Ambika Dass*[4] to the effect that the language of an enactment by which the law is recorded must receive its natural meaning without an assumption that the probable intention of the Legislature was to leave unaltered the law as it existed before. If we turn therefore, to the leading authorities in England, upon the matter, we find that in *Worthington v. Pickard*[5] Sir George Jessel observed that the meaning of the statute is that the debtor must not retain a benefit for himself; it has no regard whatever to the question of preference or priority among the creditors of the debtor. A settlement, therefore, which preferred certain creditors and tended to defeat others, might be good under the Statute of Elizabeth. Nor again is it material under the Statute, whether the assignment by the debtor is of the whole of his property, present or future, or of any part of it. Again, Lord Justice Thesiger in *Ex parte Games*[6] quotes with approval the words of Giffard, L.J. in *Alton v. Harrison*[7]: "I have no hesitation in saying that it makes no difference in regard to the Statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bonâ fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the Statute of Elizabeth." It is clear therefore that a deed is *bonâ fide* within the meaning of the Statute of Elizabeth, if it is not a mere cloak for retaining a benefit to the grantor. A similar construction has been put upon sec. 53 of the Transfer of Property Act. Thus in *Nathu v. Mayna Chand*[8], Mr. Justice Chandavarkar pointed out that the

[1] (1870) L. R. 7 Ch. 705
[2] (1885) 15 Q. B. D. 403
[3] (1891) A. C. 107
[4] (1908) I. L. R. 35 Calc. 783
[5] (1870) 2 Ch. D. 104, 106
[6] (1879) 12 Ch. D. 321
[7] (1869) L. R. 4 Ch. 622, 630
[8] (1903) I. L. R. 27 Bom. 332

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test of good faith whether the fact that the transferee had ab for obtaining a benefit to the grantor or whether it was intended thereby that the grantor should be properly and keep it. The same view was adopted in the case of *Hardeo* which the learned Judge observed that the test of good faith whether there was a genuine or reasonable transaction, and pointed out that, as laid down by Bowen, C. J. in *Ward v. Hobbs* if a consideration is made and with the full intention that the property would be parted with it will not be fraudulent if made with intent to defeat a person's right or with intent of execution for such a motive does not impeach the assignment. Substantially the same view appears to have been adopted under the law as it existed before the Transfer of Property Act was added to the statute book. As an example of these may be mentioned *Nanhoo v.* where it was ruled that if there is a real transaction between the parties for valuable consideration whether it be by way of sale or mortgage the transaction is valid as against a creditor though the object may have been to defeat or suspend execution. To the same effect are the cases of *Jai Mal v. Hira* and *Bhola Nath v.* If the test laid down in these cases is applied to the circumstances of the present litigation, it is obvious that the last must inevitably be placed out of Court. It has not been and cannot be contended but the transfer was for adequate consideration and was not a mere sham cloak for the benefit of the grantor. It must be taken, therefore, that the transaction was not only free from fraud but was, but was also entered into in good faith, so that it can consequently be successfully assailed.

Our attention, however was invited to a passage in the judgment of this Court in the case of *Lala v. Kishan Sahai*, in which the learned Judges expressed the extreme contention that all that is necessary to impeach such a transfer the character of good faith within the meaning of sec. 53, is to prove that the transfer is real, and that although

(1897) I. L. R. 24 Calc. 834.

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the transferee may show the intention of the transferor to defeat or delay the creditors he is still a transferee in good faith. It was argued by the learned vakil for the appellants that the rule thus laid down in *Lakshmi Chandra Das Sarkar* v. *Bindu Sarkar* is inconsistent with what has been accepted as the settled construction of the Statute of Elizabeth, and, in support of this view, reliance was placed upon *Wood* v. *Dixie* and *Haviland* v. *Bowerbank*. After careful examination of these and other cases to which we shall presently refer, we are not prepared, however, to hold that they lay down any definite rule which might rightly be regarded as in conflict with the observations contained in the judgment of the Court in *Lakshmi Chandra Das Sarkar* v. *Bindu Sarkar*. The decision in *Wood* v. *Dixie* goes no further than determining that the intent to defeat a particular creditor in the case of a sale for value does not, per se, as a matter of law render the conveyance fraudulent. We may refer to the judgments in *In re Maxwell*, on which the case of *Wood* v. *Dixie* is analysed and the true foundation of the decision explained. We agree with the observations of Parker C. J. that if the object of the transferor is not only to sell the property but further with the proceeds so as to affect to withdraw the property from the fund available for the creditors with that previous agreement, in such cases there would be an intention to defraud creditors which if the purchaser had notice of it would avoid the sale. To put the matter in another way although a transfer which is a mere book for the intention of the grantor of a benefit to the property transferred is not a transfer in good faith it is by no means exhaustive, there may be cases in which the transferee is intended to take an absolute interest in the property but the object of the transferor is to convert land into money and thus place it beyond the reach of the creditors of the grantor, a transfer of this description cannot legitimately be regarded as a transfer made in good faith. A similar view appears to have been adopted by the learned Judges of the Madras High Court in *Chidambaram Chettiar* v. *Sami Ayyar*[1], when they declined to give effect to the contention

(1897) I. L. R. 20 Cal. 82 (1877) 4 Ch. D. 232 (C. A.) 46 L. J. Ch. 777
(1880) 7 Q. B. 502 (1885) L. R. 31 Ch. D. 27

[1] (1905) I. L. R. 30 Mad. 6.

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that, whenever there is any real consideration, however small, for the transfer, the question of intention is immaterial, and the transaction must be held to be one entered into in good faith and therefore not fraudulent as against creditors, even though it was in fact intended to defeat or defraud creditors and has the intended effect. After careful examination of the authorities on the subject, we are disposed to hold that under the Transfer of Property Act as under the Statute of Elizabeth, good faith as well as consideration is made an essential condition of the validity of a transfer, and that there may be cases in which a transfer, although made for consideration, may be voidable on the ground that it was made with an intent to defraud creditors, in the language of Lord Coke, a good consideration does not suffice if it be not also *bona fide*": *Tarque's case* [1].

The distinction is supported by a considerable body of authority. Lord Mansfield says in discharging a rule for a new trial in *Cadogan v. Kennett* [2]: "If the transaction be not *bona fide* the circumstance of its being done for a valuable consideration will not alone take it out of the statute. I have known several cases where persons have given a fair and full price for goods, and where the possession was actually changed, and yet being done for the purpose of defeating creditors the transaction has been held fraudulent and therefore void." To the same effect are his observations in *Worsley v. De Mattos* [3], which he said that of a man, knowing that a creditor has obtained a judgment against his debtor, buys the debtor's goods for a fair price to enable him to defeat the creditor's execution is unobjectionable. Since the time of Lord Mansfield, conveyances founded upon adequate consideration have been held fraudulent by reason of the bad faith of the participants and the question has become one of vital interest and paramount importance to the parties concerned. That a conveyance whether of land or of personal property founded upon adequate consideration may be avoided and annulled at the suit of creditors for fraud, is established in an endless variety of cases: see for instances, *Holland v. Anderson* [4], *Peacock v. Tyson* [5], *Taylor v. Jaques* [6], *Lane v.*

[1] (1613) 1 Smith L. C. 1.
[2] (1776) 2 Cowper 432.
[3] (1758) 1 Burr. 467.
[4] (1810) 4 M. & S. 371; 16 R. R. 358.

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Smith[1], *Goodman v Gallant*[2], *Ex parte Mercer*[3], *Freeman v Wakeman*[4], *Stevens v Hawkins*[5]. The same view has been adopted in the American Courts. In *Hubbard v Hyman*[6], Mr Justice Hoar in delivering the opinion of the Supreme Court of Massachusetts said: "A conveyance made with an actual purpose and intent to defraud creditors present or future, is not valid against them in favour of a grantee who participates in that fraudulent intention, although made for a full consideration and by a grantor in the possession of any amount of property." The distinction is brought out somewhat more concisely and effectively than in the judgment of Black, CJ in *Cornelius v Hart*[7] in words that learned Judge observes as follows: "If a debtor with the purpose of cheating his creditors, converts his lands into money because money is more easily shuffled out of sight than land, he, of course, commits a gross fraud. If he digests on making the sale is known to the purchaser, and he nevertheless acts and assists in executing it, his title is worthless as against creditors, though he may have paid the full price. But the case is different when property is taken for a debt. One creditor of a failing debtor is not bound to take care of another. It cannot be said that one is defrauded by the payment of another. In such cases, if the assets are not large enough to pay all, somebody must suffer. It is a race in which it is impossible for every one to be foremost." To the same effect is the decision in *Hooper v Keatman*[8]. The view taken in these cases appears to be substantially identical with the view adopted by this Court in *Fakir Chandra v Baidya Nath*[9], in which the learned Judges observed that a transferee for value, who accepts the transfer for the purpose of helping the transferor to convert his immovable property into money which can easily be concealed and kept out of the reach of his creditors and thus defeat or delay the creditors, is not a transferee in good faith within the meaning of

[1] (1859) 14 Moo. P. C. 421, 436.
[2] (1856) 21 Beav. 511.
[3] (1881) 20 Ch. D. 562, 568.
[4] (1883) 25 Ch. D. 319, 338.
[5] (1834) 11 Wendell 192.
[6] (1862) 4 Metc. (Mass.) 13 Pick. 511.
[7] (1868) 100 Mass. 196.
[8] (1868) 42 Pa. St. 366; 60 Am. Dec. 97.
[9] (1901) 152 Pa. St. 306; 39 Atlantic Rep. 737.
[9a] (1907) I. L. R. 34 Calc. 826.

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section 53. The rule, however, as we have just pointed out, does not apply to the case where a debtor takes property or satisfaction of an existing debt, although the effect of the transfer to him is to defeat or delay the other creditors of the transferor. It is well settled in this country, as in England, that a bankruptcy Act, a debtor may make a transfer in favour of his creditors even to the extent of transferring all his property to a creditor to the exclusion of the others. The object of a Bankruptcy Act, so far as creditors are concerned, is to secure, as far as practicable, equality of distribution of the assets of the bankrupt among them; this, however, is not the object of section 53 of the Transfer of Property Act. It is now settled in England that a debtor may, provided the transaction is not impeached as a fraud, but preference under the Bankruptcy law, may openly prefer a particular creditor to the rest, and may transfer property to him in payment or discharge of his debt, even after the other creditors have brought actions and obtained judgment and execution, in order to evade the Statute of Elizabeth against the pretended conveyances [illegible] *Holmes v. Holmes*, *Ex parte Mayfield*, *Ex parte Hodgkinson*, *Wood v. Dixie*, *Worsley v. Wood*, *Mackay v. Douglas*. The learned Subordinate Judge who has relied upon passages from the opinion of Sarkar on Evi., Book III, Chap. III, Sec. IV, pp. 411-13, overlooked the Introduction and the history and policy of the Bankruptcy laws in England. Vide Lord Parker on Frauds on Creditors, Ch. VII, X and XIII. This is in accordance with the view taken in the cases of *Ex parte Mercer*[1] and *Ex parte Bates*[2], the principle of which appears to us to be consistent with the rule of justice, equity and good conscience. The law favours and rewards the vigilant and active creditor. The right of a debtor to devote his whole estate to the satisfaction of the claims of particular creditors results, as Chief Justice Marshall declares, from that absolute ownership which every man claims over that which is his own.

[1] (1869) L. R. 4 Ch. 822.

[2] (1793) 5 Term. R. 245.

[3] (1878) [illegible]

[4] (1870) 2 Ch. D. [illegible]

[5] (1879) 12 Ch. D. 611

[6] (1902) 2 K. B. 158

[7] (1905) A. C. 62[illegible]

[8] (1880) L. R. [illegible]

[9] (1880) L. R. [illegible]

[10] (1888) 39 Ch. D. [illegible]

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Brashear v. West[1] If while a man retains his property in his own hands, the right of giving preference should be denied, he would so far lose the dominion over his own that he could not pay anybody because whoever he paid, would receive a preference. It makes no difference that the creditor and debtor both know that the effect of the appropriation of the property to the satisfaction of a particular claim would be to deprive other creditors of the power to reach the debtor's property by legal process or enforce satisfaction of their claims. If there is no secret trust agreed upon or understood between the debtor and creditor in favor of the former, but the sole object of the transfer is to pay or secure the payment of a debt the transaction is a valid one. It cannot rightly be said that a conveyance of property which pays one creditor his just debt and nothing more is fraudulent as against other creditors of the common debtor. The mere preference to payment of one honest creditor over another is no evidence of fraud to any extent. *Harvey v. Hooker*.[2] The distinction is between a transfer of property made solely by way of preference to one creditor over others, which is legal, and a similar transfer made with a design to secure some benefit or advantage from it to the debtor which is fraudulent. *Reed v. Wilson*,[3] *Goldsmith v. Sage*.[4] In the last case for preference of a creditor by delegation secures some advantage, it should be maintained but if his purpose is not to secure his debt but to help the debtor to cover up his property, he cannot shield himself by showing that his debt was *bona fide*. *Smith v. Reed*.[5] This view is also supported by the case of *Jones v. Monteith*[6] in which Parke, C.B., observed as follows with reference to the Statute of Elizabeth: "Its object was to protect the rights of creditors as against the property of their debtor, and not to regulate the rights of creditors *inter se*, or to entitle them to an equal distribution of their property. The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them, or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to

[1] (1851) 7 Peters (32 U.S.) 608.
[2] (1864) 142 New York 280 (1867) 14 Allen, 12 (Mass).
[3] (1874) 117 Mass. 567. (1881) 9 Fed. Rep. 861.
[4] (1836) L. R. 31 Ir. 27.

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their prejudice. It follows from this that a transfer by a debtor to one creditor, upon a pretence of, or upon all his property, although the effect of it may even be intent of the debtor in making it may be to defeat or postpone execution of another creditor, is not a fraud within the statute because in thus stultifying such an act the entire property remains available for the creditors or some one of them, and as the statute gives no right to retake it from the right of the creditors by such act is not invaded or affected."

Upon a review of the authorities and upon an examination of the principles which underlie them we are of opinion, that the following rule should be: A conveyance or transfer, whether founded on a valuable or inadequate consideration or not if entered into by the parties thereto with the intent to hinder delay or defraud creditors as to them is void: *Lush v. Smith*[1], *Harman v. Anderson*[2], *Jackson v. Sheriff Cleaver v. Van Ingen*[3], *Alexander v. Tidd*[4], *Gilmore v. North Western Coal Co.*[5], *Barrack v. Blanford*[6]. It is not enough, in order to support a conveyance or transfer as against creditors, that it be made for a valuable consideration it must also be *Cornell Hitchcock v. Seaffort*[7]. Where it appears that the parties to a transaction impugned for fraud were actuated by a motive which is condemned as fraudulent namely a motive to hinder delay or defraud creditors it is entirely immaterial how valuable a consideration may have passed from the grantee or transferee for the conveyance is nevertheless void in law *Harman v. Harman*[8]. A mere fraudulent intent on the part of the grantor alone, will not invalidate the transfer if it is for valuable consideration, and there is no want of good faith on the part of the grantee. Where however, the transferee is himself a creditor, he occupies a more favored position *Hamilton v. Nichols*[9]. In the absence of a law of bankruptcy a preferential transfer of property to one creditor cannot be declared fraudulent as to other creditors, although the debtor in making it intended to defeat

[1] (1856) 21 Beav. 511.
(1858) 25 Barnes
(1860) 11 Moo. P. C. 121.
(1858) 1 Root 1
1 Fed. Cas. 353.

[4] (1817) Peter C. C. 166. 10 Fed. Cas. 1
(1868) 1 Biss. 15
[5] (1851) 105 U. S. 10
(1882) 11 S. W.
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their claims and the creditor had knowledge of such intent. If the only purpose of the creditor is to secure his debt, and the property is not worth materially more than the amount of the debt, the transaction is not fraudulent. If, however, the transfer is not in reality a preference of an actual debt, but is a mere colorable device to place the debtor's property beyond the reach of his creditors, or if the transaction extends beyond the necessary purpose of a mere preference so as to secure to the debtor some benefit or advantage or to unnecessarily hinder and delay other creditors, the transfer is fraudulent. The preferred creditor participates in the fraudulent intent of the debtor, where his purpose is not to secure the payment of his honest debt, but to aid the debtor in defeating other creditors or covering up his property or giving him a secret interest therein or in looking it up in any way for the debtor's own use and benefit. Proof of a valid subsisting debt does not necessarily disprove the existence of a fraudulent intent. The reasons for the distinction between one who purchases for a present consideration and one who purchases in satisfaction of a pre-existing debt have been very clearly formulated in the case of *Lawrence v. Lawton*: "A person who purchases for a present consideration is in every sense a volunteer. He has nothing at stake, no self-interest to serve, he may with perfect safety keep out of the transaction. Having no motive or interest prompting him to enter into it, if yet he does enter, knowing the fraudulent purpose of the grantor, the law very properly says that he enters into it for the purpose of aiding that fraudulent purpose. Not so with him who takes the property in satisfaction of a pre-existing indebtedness. He has an interest to serve. He can keep out of the transaction only at the risk of losing his claim. The law throws upon him no duty of protecting other creditors. He has the same right to accept voluntary preference that he has to obtain a preference by superior diligence. He may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve, and if he goes no further than is necessary to serve that purpose, the law will not charge him with fraud by reason of such knowledge." These reasons appear to us to be sound and unassailable, and we adopt them in justification of the principle laid down by us.

* (1899) 9 North Dakota 436, 81 N. W. 60.

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If now we apply these principles to the facts of the case before us, it is incontestable that the claim of the plaintiffs is unfounded. It cannot be suggested that the conveyance in favour of Lala Hakim Lal is for inadequate consideration. It has been conclusively proved that the debts for the satisfaction of which the transfer was made were genuine debts and they have all been discharged out of the consideration for the conveyance. It has also been satisfactorily established that the consideration for the deed represented the value of the properties transferred.

Under these circumstances it is impossible to hold that the conveyance was voidable at the instance of the plaintiffs.

The result therefore is that Appeal No. 433 of 1904 must be allowed, the decree of the Subordinate Judge reversed, and the suit dismissed with costs in both the Courts.

The effect of our decree is that the plaintiff respondents will be at liberty to execute their decree against the properties included in the conveyance except the assignment made in favour of Kunja Prasad on the 2nd September 1901, but they cannot proceed against the properties which were, on the same day, conveyed to Lala Hakim Lal.

Appeal No. 433 allowed.

Appeal No. 440 dismissed.

Note [illegible] wrong [illegible]

The [illegible] depend [illegible] And the effect [illegible] between the parties [illegible] by the creditors of the debtor [illegible] to defeat [illegible] the [illegible] can be attacked by them. The fact [illegible] not help the transferee where [illegible] shown to exist [illegible] was not fraudulent. In the leading case, their Lordships [illegible] conveyance, whether it be of real or personal property, founded [illegible] consideration [illegible] and [illegible] that here may be purpose [illegible] the [illegible] denying [illegible] would render [illegible] more difficult [illegible] because of an intention participated in by [illegible]

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Moshahar Sahu

Before The Hon'ble Mr. R. P. Rampini, Acting Chief Justice, Mr. Justice Banerji, Mr. Justice Mitra, Mr. Justice Woodroffe and Mr. Justice Mookerjee.

ASHU TOSH SIKDAR

v.

BEHARI LAL KIRTANIA.*

[Appeal from Original Decree, High Court, Calcutta, Suit No. 1011 of 1901.]

The facts of the case are these:—Two dwelling houses belonging to the judgment-debtor Behari Lal Kirtania and others, were sold on the 14th of August 1901 in execution of a money decree obtained by Ashutosh Sikdar, the appellant before the High Court, and were purchased by him. He held at the time a subsisting mortgage on the said properties. The judgment-debtor on the 7th of August 1902 applied under section 311 of the Code of Civil Procedure to have the sale set aside.

The following judgments were delivered:

Rampini, A.C.J.:—The questions referred to us are (i) whether when a sale has been held in contravention of the provisions of section 90 of the Transfer of Property Act the sale is a nullity or an irregular and voidable sale, and (ii) whether the right of redemption of the mortgagee is or is not affected by such sale?

In answer to the first question I think we must, after the expression of opinion of their Lordships of the Privy Council in *Adams and* v. *Dawe*[1], reply that a sale held in contravention of the provisions of section 90 of the Transfer of Property Act is not a nullity but an irregular and voidable sale. In my opinion, such a sale can be avoided before confirmation of sale by an application under section 311 of the Code of Civil Procedure without it being necessary for the applicant to show more than that the provisions of the Transfer of Property Act have been contravened. But after confirmation, the sale can only be avoided by an application under section 311, provided

[1] (1901) I. L. R. 27 Calc. 270.

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that the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale proceedings prior to sale

The case should, therefore, be remanded to the Subordinate Judge to be disposed of after enquiry into these matters and after decision of any other issues that may arise in the case The costs will abide the result

It seems neither necessary nor advisable for us to answer the second question put by the referring Bench

Barry J. I agree.

Mitra J. I agree.

Woodroffe J. I agree.

Mookerjee J The questions which have been referred for decision to this Bench are as follows :—(1) whether where a sale has been held in contravention of the provisions of section 69 of the Transfer of Property Act the sale is a nullity or an irregular or voidable sale, or whether the right of redemption of the mortgagor is or is not affected by such sale.

Section 69 upon the construction of which the answer to these questions must primarily depend, provides as follows : "where a mortgagee, in execution of a decree for the satisfaction of any claim whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale, otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43." It is to be observed, in the first place, that the terms of the first portion of the section are very wide. The mortgagee is prevented from bringing the mortgaged property to sale in execution of a decree for the satisfaction of any claim, related or extraneous to the mortgage. The obvious intention of the section is to prevent the mortgagee from executing a money decree against the mortgaged property so as to deprive the mortgagor of his right of redemption. In the second place, it is to be observed that, under the section, the only mode in which the mortgagee may bring the mortgaged property to sale, is by the institution of a suit under section 67 of the Transfer of Property Act. At one time, some doubt appears to have been entertained as to the precise

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Bedanta Lal Kataruka

scope of the suit, which the mortgagee was thus required to institute under section 67. Reference may be made to the decision of the Court in *[illegible] v. [illegible]*[1], in which it appears to have been argued that the set-off contemplated might be based on the charge created by the attachment for value on the money decree. The contention, however, did not find much favour with the Court and has been subsequently negatived by the Allahabad and the Madras High Courts. Thus in *[illegible] v. [illegible]*[2], the learned Judges of the Allahabad High Court held that the suit which the mortgagee is required to institute by section 67, is a suit to enforce the mortgage, and not a suit on the charge created by the attachment. To the same effect is the decision in *[illegible] v. [illegible]*[3], and a similar view was recently adopted by the learned Judges of the Madras High Court in *Gowda Bhatta v. Narasa Bhatta*[4]. To the same effect are the cases of *[illegible] v. [illegible]*[5] and *[illegible] v. [illegible]*[6], which may be taken to be binding, as they affirmed the principle that it is necessary to enforce the mortgage charge before the Court can sell the property and obtain satisfaction of the money decree by the sale.

The substance of the matter therefore is that when the mortgagee has, in execution of a money decree obtained by a mortgagor effected an attachment of the mortgaged property, he cannot proceed to sell it in execution of the money decree against all the parties interested in the equity of redemption, but for the sale of the property free from the mortgage claim of the plaintiff, a decree should be applied, in the first instance, for the discharge of the mortgage on the property, in the ordinary form prescribed, and the surplus, if any, towards the satisfaction of the plaintiff's claim under the attachment, so far as may be necessary. It is, then, in the true scope and meaning of section 64, that questions as to the precise effect of the attachment upon the mortgage arise. Upon this question, there has been, as well pointed out [illegible]

[1] (1907) I. L. R. 31 Cal. 11
[2] (1904) I. L. R. 26 All. 11
[3] (1905) I. L. R. 17 All. 2
[4] (1906) I. L. R. 29 Mad. 521
[5] (1908) I. L. R. 32 Cal. 961
[6] [illegible]

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divergence of judicial opinion. But before the authorities are reviewed, it is desirable to observe that, upon one preliminary point, there is no difference of opinion. It has been uniformly held, that if a mortgagee in execution of a decree for money, seeks to sell the mortgage property, in contravention of the provisions of section 68, and if objection is taken before the sale, by the holder of the equity of redemption the objection must be allowed, and the sale prevented. To this effect are the decisions in *Ahmad v. Nath Ray*[1], *Bengal Shanaka Library v. Hari*[2], *Hari v. Gour Sundar Pandya*[3], *Krishnaswami Iyer v. Narayana Aiyar*[4], *Jadhav Singh v. Gopal Singh*[5], *Hira Lal v. Behari Lal*[6], *Madho Prasad Singh v. Kamakhya Narain*[7], *Ambika v. Jagadbandhu Pal*[8] and *Ram Lal Bapu v. Anja Lala Kanjibo*[9]. The view taken in these cases is supported with great force, as the object of section 68 of the Transfer of Property Act is to render it impossible that there should be a sale of the mortgaged property save by the institution of a suit under section 67, the provisions of the section would be rendered absolutely nugatory, if objection taken before the sale by a person interested in the equity of redemption was not allowed to prevail. The Court will not allow the mortgagee to act in defiance of the provisions of the statute, and will not hold a valid sale upon a construction of the law, if it is supported of the fact before the sale has taken place. The only question is what is the effect of the sale if it has actually taken place, and how does it affect the position of the parties. Upon this matter, judicial opinion has been widely divergent.

The cases on the subject, when analysed and classified, will be found to fall into three divisions. In the *first* class of cases, it has been held, that a sale of the mortgaged property by a mortgagee in execution of a money decree in contravention of the provisions of section 68, passes no title whatever to the purchaser. In the cases of *second* class it has been ruled that, as the sale is a voidable, it is not necessary for the person interested in the equity of redemption to take any objection to the sale, or to have it set aside, but he may proceed on the assumption that the sale

[1] (1905) I. L. R. 32 Calc. 913.
[2] (1905) I. L. R. 32 Calc. 829.
[3] (1905) I. L. R. 28 All. 58.
[4] (1905) I. L. R. 29 Mad. 356.
[5] (1905) I. L. R. 27 All. 494.
[6] (1906) I. L. R. 28 All. 450.
[7] (1906) I. L. R. 33 Calc. 691.
[8] (1906) 3 Bom. L. R. 479.
[9] (1906) I. L. R. 30 Bom. 450.

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has not in any manner affected his rights in the property. In other words, the purchaser acquires no title under the sale, which he can enforce as a plaintiff or set up as a defence when he is attacked, and it makes no difference whether he is the mortgagee or a stranger to the proceedings. To this class of cases belong *Sathappa* v. *Muthusami* [5], *Durgappa* v. *Ananthu* [6], *Shankar Pandu* v. *Ram Saran Singh* [7], *Shib Dass Dass* v. *Ajodhya Koer Jaswant* v. *Ajodhya Koer Dass Jagannath* v. *Bathoo* [8] and the case of *Hanmant* v. *Sitaram* from *Shankarrao* seems to support the same view by implication.

In the second class of cases it has been ruled, that a sale on execution of a money decree in contravention of section 64 is an illegal sale which is required to be set aside in order that it may cease to be operative. To this class belong the cases of *Jagannath* v. *Hanmant*, *Hanmant Patil* v. *Jagannath* [9], *Hathibhai Chatur* v. *Thompson*, *Tulsi Pershad* v. *Thandoo Ram* [10], *Ram Chand* v. *Lachi Hasan* [11], *Muhammad Abdul Rashid Khan* v. *Hasan Ali*, [12] *Sher Singh* v. *Hira Singh*, [13] *Tirumalai* v. *Mahalingam*, [14] and *Bhadra* v. *Arjun*. [15] But although these decisions are founded on the same ground that the sale is not a nullity and is merely voidable because illegal, they do not indicate the same mode for avoidance of the sale. Some of the cases seem to assume that a regular suit may be instituted for the purpose, others seem that the appropriate procedure is by way of an application under section 244 of the Civil Procedure Code, while the case of *Jagannath* v. *Hanmant*, [9] unmistakably implies that an application under section 47 of the Civil Procedure Code is available to the mortgagor who like the plaintiff in this case established that he was not aware of the impending sale before it took place and was consequently unable to prevent it by a suitable objection in time. Apart from the difference between these cases pointed out

(1888) I. L. R. 12 Mad. 105 — (1888) I. L. R. 12 Mad. 105

* (1890) I. L. R. 13 Mad. 214 — (1890) I. L. R. 13 Mad. 214

(1891) I. L. R. 15 Bom. 501 — (1891) I. L. R. 15 Bom. 501

* (1891) I. L. R. 18 Cal. 233 — (1891) I. L. R. 18 Cal. 233

(1892) I. L. R. 16 Bom. 711 — (1892) I. L. R. 16 Bom. 711

* (1893) 7 Mad. L. J. 1 — (1893) 7 Mad. L. J. 1

(1896) I. L. R. 20 Bom. 111 — (1896) I. L. R. 20 Bom. 111

* (1897) I. L. R. 19 All. 69 — (1897) I. L. R. 19 All. 69

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the common ground that the sale is not without jurisdiction and is not null and void.

In the *third* class of cases it has been held, that a sale held contrary to the provisions of section 310 is not a nullity and that though voidable, yet even if it is not formally annulled, it does not affect the right of redemption of the mortgagor. To this class, belong the cases of *Hurrish Buksh Khan Khan* v. *Bhawla Doomar Ahluwal*, *Iswar Jha Hardeo* v. *Umrao Singh* and *Hurrish Buksh*, *Panday* and the same principle was explicitly recognised in the cases of *Hurro Prosad* v. *Pahar Ali*, *Narayan* v. *Hathi* and *Debendra* and *Ahmad* v. *Hem*. The last two cases, however, were decided independently of the provisions of the Transfer of Property Act which were not applicable to the transactions in dispute in those cases. Whatever these cases, they cannot be relied upon as direct authorities upon the matter now in controversy.

The question which now requires consideration is, whether the view adopted in the last class of cases namely that a sale held contrary to the provisions of section 310 is a nullity, is well founded on reason and principle. The determination of the question must depend upon the nature of the rule embodied in that section. If it be held, that a sale held contrary to the provisions of section 310 is a sale wholly without jurisdiction, it may be treated as a nullity; or if it be held that a sale so held is in contravention of public policy the same conclusion might follow. If on the other hand it was held that the object of the Legislature was to afford protection to the individual debtor, he might elect to waive the benefit thereof. In this latter view, he might by payment of the appropriate money at the proper stage of the proceedings avail himself of the protection afforded by the statute, or he might, by reason of his omission to do so, lose the benefit thereof. Before, however, we examine the principle of the rule embodied in section 310 it is necessary to deal with an extreme contention of the respondent, namely, that, as a sale in contravention of section 310 is a sale prohibited by the statute in the most emphatic terms, it must necessarily be treated

[1] (1887) I. L. R. 13 Bom. 624.
[2] (1888) I. L. R. 15 Mad. 5.
[3] (1892) I. L. R. 19 Mad. 317.
[4] (1894) I. L. R. 21 Mad. 421.
[5] (1904) I. L. R. 32 Calc. 203.

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as a matter of. This broad contention is supported by neither principle nor authority. It cannot be affirmed as a proposition of law of universal application that non-compliance with every provision of the law makes the proceedings a nullity, see the observations of this Court in the orders of reference to a Full Bench in *Nasib Lal Sheikh v. Tara Kumar Pal*[1], and *Akbar Mahomed v. Nasir Mahomed*[2]. Reference may also be made to five decisions of their Lordships of the Judicial Committee illustrative of this position. The cases of *Fazulbhoy Hamed Adamji v. Hamed Hussen*[3] (where a sale had been held in violation of the provisions of section 290 of the Civil Procedure Code), *Gurmukh Lal Singh v. Kishen Dayal Bhasin*[4], (where a sale for arrears of revenue was held in contravention of the provisions of sections 6 and 17 of Act XI of 1859), and *Hurpurshad v. Sheo*[5] (where a sale was held contrary to the provisions of section 216 of the Civil Procedure Code) amply show that there may be cases in which the violation of an express provision of a statute may not nullify the proceedings. On the other hand the cases of *Nanoo Ramchand Patwari v. Hari Hanmant*[6] (where an arbitration proceeding was carried on contrary to the provisions of the Bombay Regulation VII of 1827) and *Queen-Empress v. Abdul Rahim*[7] (where a trial was held in contravention of the rule of joinder of charges contained in section 234 of the Criminal Procedure Code) afford illustrations of cases in which failure to comply with the provisions of a statute may completely vitiate the proceedings. The only rule that can be adopted is that, when the provision of a statute has been contravened, if a question arises as to how far the proceedings are affected by such contravention, it must be determined with regard to the nature, scope, and object of the particular provision which has been violated. As pointed out in Maxwell on Statutory Irregularities, no cast and fast line can be drawn between a nullity and an irregularity, but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or applicants whose operation, whereas a nullity is a proceeding that is taken without

[1] (1905) I. L. R. 33 Cal. 73.
[2] (1905) I. L. R. 33 Cal. 1.
[3] (1903) I. L. R. 31 Cal. 49.
[4] (1907) I. L. R. 34 Cal. 7.
[5] (1907) I. L. R. 34 Cal. 17.
[6] (1906) I. L. R. 30 Bom. 1.
[7] (1911) I. L. R. 35 Mad. 61.

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any foundation for it, or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated. It may be conceded, that the application of this doctrine to an individual case, may sometimes be attended with difficulty. One test, however, is well established, and is often useful, as was observed by Mr. Justice Coleridge in *Holmes v. Russell*[1], "it is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what a nullity is to see whether the party can waive the objection, if he can waive it, it amounts to an irregularity, if he cannot, it is a nullity." To the same effect are the observations of Mr. Justice Taunton in *Gurney v. Hogg*[2]. We shall now consider in the light of these principles whether a sale held contrary to the provisions of section 66 may rightly be regarded as a nullity. It was argued by the learned vakil for the respondent that a sale of this description is without jurisdiction and consequently null and void. In my opinion this contention is founded upon a misconception of what is connoted by the jurisdiction of a Court, the nature of which is explained in the Order of Reference in the case of *Nath Lal Mookerjee v. Kanai Lal Ass* and in the judgment of this Court in the case of *Gopal Chandra Sarkar v. Kanai Lal Sirkar*[3]. When a mortgagee in execution of a money decree against the mortgagor has effected an attachment of the property comprised in his security, he has a twofold claim enforceable thereupon, namely, one under the attachment and the other under the mortgage. All that section 66 provides is, that the property shall be sold only after a decree for sale has been obtained on the basis of the mortgage. The Court has undoubted jurisdiction over the subject-matter out of which the two debts are to be realised; it is unquestionably competent to exercise a judicial power namely, the power of sale in relation to it; section 66 only prescribes the mode in which such power is to be exercised. When a sale is, therefore, held in contravention of section 66, the Court cannot be said to exercise a jurisdiction which it does not possess, it can at most be said to assume and exercise, in an irregular manner, the jurisdiction which it possesses. The defect, therefore, is one which is curable by consent or waiver. As

[1] (1841) 9 Dow., 487.
[2] (1831) 1 Dow., 28.
[3] 21 I. L. R. 41 Calc. 68 at p. 74; (1913) 18 C. L. J. 614.

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observed in the cases of *Ex parte Hall*[1], *Ex parte Sen v. Chunder Mohun Mukherjee*[2], and *Ex parte Smith v. Lewis & Scott*[3], it is only where a Court lacks inherent jurisdiction over the subject-matter of the proceeding in question, in which an order is made or a judgment rendered that such order or judgment is wholly void, with the result that the order may be shown to be a nullity in any proceeding where reliance is placed upon it, although no formal or direct proceeding has been taken to have it vacated or reversed. To such a case the maxim applies that consent cannot give jurisdiction. But these principles have no application, where the Court possesses inherent jurisdiction over the subject-matter, and merely has power to exercise that jurisdiction in an irregular or illegal manner. The objection in such a case may be waived, and may, in general, be assumed to be waived, where not taken at the time the exercise of jurisdiction is first claimed to the knowledge of the party affected. These principles make it manifest that a sale held contrary to the provisions of section 99 cannot properly be treated as absolutely null and void as if it were a sale held without jurisdiction.

It was next argued by the learned vakil for the respondent that the language of section 99 which expressly prevents the mortgagee from selling the mortgaged property in execution of a money decree, is imperative and that a sale in violation of that section ought to be treated as a nullity. It is well settled, however, that no general rule can be laid down as to whether a provision in a statute is absolute or directory. It was ruled by Lord Campbell, L. C. in *The Liverpool Borough Bank v. Turner*[4], "that no universal rule can be laid down as to whether mandatory enactment shall be considered directory only, or obligatory, with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed." To the same effect are the observations of Lord Penzance in *Howard v. Bodington*[5] and of Cotton L. J. in *Chandler v. Bowerman*[6]. When the object of the statute has been determined, if the statutory provision is not based on

[1] (1880) I. L. R. 6 All. 101; L. R. 15 I. A. 134.
[2] (1905) 2 C. L. J. 354.
[3] (1906) 5 C. L. J. 614.
[4] (1860) 30 L. J. Ch. 379.
[5] (1877) 2 P. D. 203.
[6] (1894) 1 Com. L. R. 39, 51.

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grounds of public policy, and is intended only for the benefit of a particular person or class of persons, the conditions prescribed by the statute are not considered as indispensable and may be waived, because every one has a right to waive, and to agree to waive, the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, and which may be dispensed with without infringement of any public right or policy. This rule is expressed by the maxim of law, *Quilibet [illegible] pro se introductum renunciare* any one may renounce a law introduced for his own benefit Broome's Maxims, 7th Ed., page 531, and Hughes on Procedure Vol I, page 353, *Jones v N P R Co*[1], *Cutler v Dorr*[2] As was pointed out by Lord Westbury in *Hunt v Hunt*[3] the word *prima facie* were introduced into the maxim, "to show that no man can renounce a right of which his duty to the public and the claims of society forbid the renunciation" *Pinkett v Wright*[4], *Hawthorne v Bishop of Rochester*[5] *Waite v Hayes*[6], *Montgomery v Edwards*[7], *Hobbs v Hudson*[8] In view of these principles, let us consider for a moment, the object of the rule embodied in section 89 of the Transfer of Property Act It was pointed out by the learned Judges of the Allahabad High Court in *Mahabir Singh v Sheo Ratan*[9] that section 89 was enacted with a view to prevent the evil results which followed from sales of mortgaged properties by mortgagees in execution of money decree, these consequences are stated to have been threefold, namely, first, the mortgagor who would ordinarily be entitled to the facilities afforded in a mortgage suit for repayment of the mortgage debt, is summarily deprived of the equity of redemption, secondly, a purchaser would hardly pay full value for the equity of redemption, as he would take subject to the unascertained claim of the mortgagee with the result that the mortgagee himself would purchase the property for a merely nominal sum, and thirdly, that if the purchaser took the property without notice of the mortgage and was subsequently called upon to discharge the encumbrance,

[1] (1867) 1 C. B. N. S. 641, 646
[2] (1860) 2 Mass. R. L. Rep. 523
[3] (1902) 4 Bom. L. R. 221, 234
[4] (1870) L. R. 5 C. P. 634.
[5] (1899) 5 C. P. D. 194
[6] (1872) 15 Wallace U. S. 161
[7] (1874) 14 Am. Rep. 618
46 Vermont 151
[8] (1904) A. C. 129
[9] (1915) I. L. R. 37 All. 580

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there might be great hardship upon him unless he was afforded the benefit of the doctrine of estoppel *Hemmant Hanchandra* v *Shib Sahai*[1]. Reference may also be made to the cases of *Gobal Hari Deo* v *Prankrishna Mookerji*[2], *Jadu Nath Singh* v. *Nandkishore Lal Das*[3], and to the observations of Dr Whitely Stokes in his Anglo-Indian Codes, Volume I, page 734, where the object with which section 92 was enacted is explained. It may be a matter for controversy whether regard be had to the decision in *Hemmant Hanchandra Mukund* v *Ray Commar Jewa*[4] and *Jogendra Deo* v *Shama Charan Bose*[5], the evil which the Legislature had in view had any real existence, and if so, whether a decision of this character was required to realise the object in view. That enquiry is foreign to our present purpose, for so much is beyond controversy that the main object of section 92 was to afford protection to the owner of the equity of redemption. It is coherent to refer to the judgment of Phear J in *Hemmant Kunwar Chandhuj* v *Gobindmoni Dasi*[6], of Norman J in *Ram Lochan Sircar* v *Kasem Ali*[7], of Macpherson J in *Amrut Jadu* v *Ram Lochan Sircar*[8], and of Markby J in *Nagendra Mookerjee* v *Upendra Narain Deb*[9]. The matter is considered with more effectiveness than in the judgment of Mr Justice Norman, where upon an elaborate review of the English authorities on the question of the relation of the mortgagee to the mortgaged premises, that learned Judge ruled that a mortgagee might not be allowed to sell the mortgage property in execution of a mere money claim, and that if he did so and purchased the property himself, he could not acquire an irredeemable title. It is not necessary to consider whether there are any and if any what qualifications to this principle. Jones on Mortgages section 713 and sections 1035 to 1041. It is sufficient for our present purpose that this was the principle which the Legislature had in view. If so, as the provision was for the benefit of the person entitled to redeem the mortgage property he might waive it, if with full knowledge of the impending sale he

(1908) I. L. R. 21 All. 209.
[2] (1880) I. L. R. 2 Beng. D. 167.
[3] (1902) I. L. R. 29 Cal. 237, 241.
[4] (1878) 14 B. L. R. 76; 23 W. R. 287.
[5] (1876) I. L. R. 1 Calc. 237; 24 W. R. 61.
[6] (1867) 8 W. R. 204.
[7] (1870) 5 B. L. R. (O. C.) 100.
[8] (1872) 10 B. L. R. (O. C.) 87.

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execution of a money decree he allows the property to be sold, if with knowledge that the sale has taken place, he allows the sale to be confirmed, that is, to become final and conclusive, upon what principle can he be allowed to challenge the title of the purchaser, because the sale has been held in contravention of the provisions of section 99? There are no intelligible grounds on which he ought to be permitted to do so. This view is borne out by the decision of their Lordships of the Judicial Committee in *Khairaati v. Imam*[1] where it was ruled that a sale by a mortgagee on the basis of a money decree for the mortgage debt, and a purchase by him of the equity of redemption on execution, do not relieve him of his obligations as mortgagee, though the sale is not a nullity for want of jurisdiction but is affected by irregularity in procedure only. On these grounds, I must respectfully dissent from the decision in the first class of cases, that a sale in contravention of section 99 is a nullity.

The question next arises, what are the rights of the owner of the equity of redemption, when a sale, which is contrary to the provisions of section 99, and which is consequently merely voidable has been actually held? The second and third clauses of rules contain that his remedies are two-fold: he may either seek to set aside the sale, or he may seek to redeem the property. If he adopts the former alternative, it is reasonably clear that he ought to proceed by way of an application under section 244 of the Civil Procedure Code to set aside the sale, and not by way of a regular suit. The question of the validity of the sale is clearly a question relating to the execution or satisfaction of the decree, and it is a question which arises between the parties to the suit or their representatives: an application for reversal of the sale is, therefore, the proper procedure. But up to what stage of the proceedings is such an application permissible? Obviously, it ought not to be allowed after the sale has been confirmed that is, has become final and conclusive, unless the applicant establishes that by reason of fraud or otherwise, he had not notice of the sale or of the proceedings which led up to it. There is indeed, one case *Thakur v. Jhandera*[2] in which it was held that an application for reversal of the sale ought not to be allowed at all, if the

[1] (1904) I. L. R. 32 Calc. 295; L. R. 32 I. A. 23.
[2] (1899) 10 Mad. L. J. Rep. 110.

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judgment-debtor had notice of the sale and could have prevented it by appropriate objection before it took place. This view was sought to be supported by reference to the decision of this Court in *Durga Charan Mahat* v. *Ram Protap Sircar* [1], and a similar view was adopted in *Umed* v. *Jairam* [2]. It is to be observed, however, that in *Durga Charan* v. *Ram Protap* no objection to the validity of the sale was taken and allowed to be taken, after the confirmation of sale, on the ground that the judgment-debtors had no knowledge of the proceedings which led up to the sale and its confirmation. In my opinion there is no obvious distinction between an application to set aside the sale before its confirmation and another made after the confirmation under section 310 of the Civil Procedure Code, the effect of which was examined by this Court in *Hasan Ali* v. *Mahomed Yusuf* [3], the title of the purchaser at an execution sale is not perfected till confirmation and it does not vest in him before the date of the sale certificate. It is liable to be set aside either under section 310A or part of the Civil Procedure Code if so, there does not appear to be any good reason why it should not be liable to attack on the ground that it has been sold contrary to the provisions of section 99 of the Transfer of Property Act. That ground if established, would, by itself, be sufficient to entitle the judgment-debtor to have the sale set aside. The decree-holder can hardly take up the position, that the judgment-debtor is stopped by reason of his omission to take objection before the sale, because the legislature has with his eyes open, acted in contravention of the provisions of the statute. If, however, the application is made after the confirmation of the sale the position is different. If the judgment-debtor was aware of the sale, and it has been confirmed with his knowledge, he must be taken to have been a party to that order. Under such circumstances, on what principle can he be permitted to challenge the sale after confirmation? See Elliott on Void Judicial and Execution Sales, section 150 and Freeman on Void Judicial Sales, section 41.] Section 99 is intended for his protection; assume that before the sale, he was not in a position to judge whether a sale, contrary to that section, would prejudice him, and he may

[1] (1880) I. L. R. 20 Calc. 327. [2] (1907) 4 Nag. L. J. Rep. 112.
[3] (1907) 7 C. L. J. 2.

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be a good reason for his omission to take objection before the sale, but surely after the sale and before confirmation, he ought to decide whether he will adopt it or challenge its validity. This view is supported by the cases of *Hafiz Hidayat Hut v. Jamna Kandpuri*[1] and *Hardi Prasad v. Pala Ram*[2]. If, therefore, with full knowledge of the sale he allows it to be confirmed, he may be taken to have waived the objection. If, on the other hand the sale has been held, and the confirmation obtained without his knowledge, he is entitled, even after confirmation, to apply for a reversal of the sale. Under such circumstances the confirmation would be no bar: see *Bhagi Chandra v. Asit Pramanik*[3], *Nil Kanthal v. Nanda Roy*[4], *O'Connor v. Richards*[5], *Hira v. Hira*[6], and *Hiralal v. Hiralal*[7] that, whether the application is made before or after the sale, the only element which it is necessary for the owner of the equity of redemption to prove to obtain a reversal of the sale is that section 73 has been contravened. It is not necessary to prove any irregularity or substantial injury as would be required in a case under section 311 of the Civil Procedure Code. Upon proof that section 73 has been contravened, the sale must be set aside.

The third class of cases, to which reference has been made, affirms the doctrine that a sale held contrary to the principle embodied in section 73 is not a nullity, and if the mortgagee purchases at such a sale he does not acquire an irredeemable title. The leading decision on this point is that of the Judicial Committee in *Allahabad Bank v. Broom*[8]. There the mortgagees obtained a decree for money against the mortgagors upon a claim independent of the mortgage, they executed this decree, and purchased the equity of redemption. The mortgagors then sued to redeem the mortgagees upon the footing that the sale was a nullity. Their Lordships ruled that the sale could not be treated as a nullity, but that the mortgagees had not acquired an irredeemable title. They accordingly allowed the mortgagors to redeem upon payment of what was due upon the mortgage and what had been paid by the mortgagees at the execution

[1] (1896) 3 All L. J. Rep. 121
[2] (1904) 1 All L. J. Rep. 201
[3] (1909) 1 L. R. 36 Calc. 727
[4] (1909) 1 L. R. 37 Calc. 810
[5] (1857) Sauss. & Scul. 210
[6] (1911) 10 A. & Ed. 190.
[7] (1703) 2 Vez. 51
[8] (1904) 1 L. R. 32 Calc. 250

sale for the purchase of the equity of redemption [is the sale] is merely voidable, and therefore cannot be set aside by the appropriate procedure at once by persons such as the mortgagor can exercise the right to redemption, for the sale has been set aside, and there was a fact been adjudicated *Mathews v. Jones*[1] but although there may be room for controversy whether the view is that a sale may be declared that it leads to substantial justice and is practically the same as would be attained by a reversal of the sale in the first instance, and redemption thereafter of the mortgage made upon the application made for redemption, but before the sale was paid at the execution sale and the mortgagor will be free to redeem his property. According to the view taken by the Judicial Committee the mortgagor gets back the property upon payment of principal and interest. The result is exactly the same but the procedure is different. In Bombay the practice is a successful application to set aside the sale, followed by a suit on the mortgage in which the mortgagor has an opportunity to redeem. In either case, there is an action for redemption in which the contested questions are settled. It is not necessary for our present purposes to go into the matter further, when and process are necessary and for redemption, but I do not that in *Mathews v. Jones* the learned Judges of the Madras High Court have held that when the purchase happens to be of the mortgagee, that a suit is the only course open to the mortgagor and that the sale made by an application under section 244 of the Civil Procedure Code, and he cannot maintain an action for redemption against the mortgagee and the purchaser at the execution sale. In such a case if the sale is not set aside the purchaser who becomes the owner of the equity of redemption and who would be entitled to redeem the mortgage.

The answers, therefore, which I would give to the questions referred to the Full Bench are as follows:

When a sale has been held in contravention of the provisions of section 99 of the Transfer of Property Act the sale is not a nullity: it is an illegal and voidable sale: it may be set aside by an application under section 244 of the Civil Procedure Code at

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any time before it has been confirmed. It may also be set aside by a similar application after confirmation, if the applicant proves that he had no notice of the sale or of the confirmation by reason of fraud or otherwise, the only element which is necessary for reversal of the sale is that section 90 has been contravened. The second question, namely, whether the right of redemption of the mortgagor is or is not affected by such a sale need not be answered as it arises on an application for redemption and not in the present proceedings for reversal of the sale.

If we apply these principles to the case before us it is obvious that the order of the Court below cannot be sustained. The sale which is impugned took place on the 14th August 1901, and was confirmed on the 25th September following. An application to set aside the sale was made on the 4th August 1902. The sale was attacked on various grounds of fraud, material irregularities and substantial injury. The Court of first instance did not enquire into these allegations but set aside the sale on the ground that it had been held contrary to the provisions of section 90 of the Transfer of Property Act. The order was confirmed on appeal. I think the order must be discharged. Before the sale can be set aside on the ground of contravention of section 90, the applicant must establish that the sale and its confirmation took place without his knowledge. If he proves this, the sale must be set aside if he proves the grounds alleged to be material applications must be investigated.

Case remanded.

Note—In equity, a mortgagee standing, with respect to the mortgaged property, in the position of a pledgee, and having in [illegible] acquired by [illegible] with the mortgagor's consent and all usual rights and [illegible] does not become [illegible] entitled to foreclosure of [illegible] the property or payment of the debt, except by virtue of [illegible] and of course does not lose the character of mortgagee and the [illegible] to exist in it. He may mark out an equity as mortgagee and [illegible] but a subsequent mortgagee cannot obtain a decree for sale in [illegible] but a subsequent mortgagee cannot destroy the right of the mortgagor to [illegible] without the [illegible] agreed to him. *Newbould v. Kemmis* 6 B. L. R. 600 note (per Norman J.).

A sale [illegible] contravention of Section 90 of the Transfer of Property Act (New Code) is not the basis of a Court Decree or order a nullity but a mere irregularity. As to such [illegible] see page 72 of 3 L. R. [illegible] Case. Notice, coupled with every presumption of law does not make the proceedings a nullity. Thus, in the case of a plaint which

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[illegible]

... in an action, as for example his right to ... out of the ...

[illegible]

... of the Indian Contract Act and S. 120 of the Indian Evidence Act.

[illegible]

See Sec. 5 ... the Indian Succession Act.

[illegible]

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[illegible]

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April 10

The judgments of the Court were as follows:

MOOKERJEE J. The circumstances which gave rise to the litigation out of which the present appeal arises are to some extent complicated; but although they were in controversy between the parties in the Court below, the facts found by the Subordinate Judge have not been challenged before us. These facts, so far as it is necessary to state them for the disposal of the questions of law raised in the two appeals, may be briefly stated. On the 2nd November, 1880, the first four defendants in the present suit executed a mortgage in favour of the father of defendant No. 11. The property comprised in the security consisted of a share in Mahal Bajpur Chur, which included three villages, Bajpur Khas, Kachnath and Bokaur. The mortgagors undertook to repay the loan on the 15th June 1881. Subsequently, on the 1st February, 1895, the plaintiffs purchased from the mortgagee his rights under the security of 1880, and on the 15th June, 1900, commenced the present action to enforce them. The defendants, against whom relief is claimed or who are sought to be bound by the decree in the present litigation, may be divided into three groups. The first four defendants are the mortgagors, the next four are some encumbrancers, who have enforced their securities as against the mortgagors, and the third set of four defendants are other encumbrancers similarly situated.

The transactions, by which these two sets of defendants claim to have acquired an interest in the properties included in

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the mortgage, which is the foundation of the title of the plaintiffs, appears to be as follows. On the 14th December 1881 the first four defendants executed a mortgage in favour of defendants 5 to 8 in respect of a share of Mauza Rampur Chaur. On the 31st May 1884, the mortgagees sued to enforce their security, and joined as parties defendants not only their mortgagors, but also the predecessor in interest of the present plaintiffs, namely, the mortgagee of 1880. On the 31st March 1885, the mortgagees obtained a decree against their mortgagors, but their claim was dismissed as against the mortgagee of 1880. Subsequently, they executed this lease and became purchasers of the property comprised in their security. On the 4th May, 1887, the first four defendants executed a mortgage in favour of defendants 1 to 8 and the property comprised in this security were shares in Mauza Rampur Chaur and another property by name Chamlawa. On the 31st May 1894 the mortgagees sued to enforce their security and joined as parties defendants their mortgagors, as well as the mortgagee of 1880. On the 21st March 1895 the suit was decreed as against the mortgagors, but was dismissed as against the predecessor in title of the present plaintiffs. Subsequently, they executed their decree and became purchasers of the properties comprised in their security.

On the 29th March and 2nd June 1888, the first four defendants executed two mortgages in favour of defendants 9 to 12. The properties comprised in these securities were shares of Mahal Rampur Chaur which included Kachna and Belwa. In 1899 the mortgagees brought a suit to enforce their security and joined as parties defendants not only the mortgagors but also defendants 1 to 8, that is the mortgagees of 1881 and 1887, defendant 14, that is the mortgagee of 1880, and the present second plaintiff, who had taken a conveyance from the mortgagee of 1880 for the benefit of himself and the other plaintiff. On the 9th April 1900, the mortgagees obtained a decree which reserved in favour of defendants 1 to 8 a declaration of priority, not merely in respect of their bond of 1881 but also with regard to a sum of Rs. 1,172 out of the debt due to them under their bond of 1887. The decree, however, insisted that the mortgagees should proceed in the first instance against

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properties other than Mehal Raipur Chur. On the 23rd November 1900 the mortgagees enforced their decree and purchased Kachrath and Burkari in partial satisfaction of their dues. This did not, however, affect their right to proceed against Raipur Chur for the realization of the remainder of their dues under their mortgage decree.

In the present case the claim of the plaintiffs under the mortgage of 1886 has been resisted substantially by the two sets of defendants, whom we have described as defendants 5 to 8 and defendants 9 to 12, and the principal point in controversy between the parties is as to the manner in which their respective rights under the different mortgages and execution sales are to be regulated. The learned Subordinate Judge has made the usual mortgage decree in favour of the plaintiffs for Rs. 9,141, and has directed that, if the decretal money is not paid within three months, the mortgaged property, Mehal Raipur Chur, is to be sold subject to the prior mortgage of defendants 5 to 8, and subject to the charge of the remaining several sums of defendants 9 to 12, so that the purchaser at the sale will have to pay up the mortgage-debt of defendants 5 to 8 and the balance of the judgment-debt due to defendants 9 to 12. Against this decree objections have been taken by all the parties interested. Defendants 5 to 7 have preferred Appeal No. 510 of 1904. The plaintiffs have preferred Appeal No. 508 of 1904, and a memorandum of cross-objections has been presented on behalf of defendants 9 to 12.

On behalf of defendants 5 to 7 the judgment of the lower Court has been assailed substantially on four grounds, namely, *first*, that the Subordinate Judge had no jurisdiction to hear the case; *secondly*, that the decrees obtained by these defendants on the basis of their mortgages of 1884 and 1887 operate as *res judicata* so that the plaintiffs are not entitled to enforce their security as against the properties purchased by the appellants in execution of the two decrees obtained by them; *thirdly*, that the appellants are entitled to priority over the mortgage of the plaintiffs, not only in respect of their mortgage of 1884, but also in respect of the sum of Rs. 1,952 which formed part of the consideration of their mortgage of 1887; and, *fourthly*, that the plaintiffs are not entitled to

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interest upon their security at the rate it comes as they had subsequently entered into a valid compromise by which they undertook to reduce the rate of interest.

On behalf of the plaintiffs the decision of the Subordinate Judge has been attacked substantially on two grounds, namely, first, that he has given the defendants by the mortgages of 1881 and 1887 two different sets of rights which is inadmissible as against the positive contract of the plaintiffs, namely, as we understand it, and that consequently the plaintiffs are entitled to enforce their security pursuant to the same manner as if the mortgages of 1881 and 1887 had never been executed; and secondly, that defendants 1 to 3 and 5 to 12 were bound to render an account of the profits of the property, of which they have taken possession as trustees at the rates laid down in section 76 of the Contract Act. On behalf of defendants 1 to 12 the decision of the Subordinate Judge has been attacked on the ground that he was not entitled to grant relief to the plaintiffs without their having applied for it in the plaint. We shall first take up the question raised in the appeal of the defendants 1 to 12, but as the question of res judicata raised by the cross-objections filed by the plaintiffs must be disposed of before we can deal with the question from the point of view of both the parties.

The first question to be dealt with is whether the decision of the Subordinate Judge is or is not a decree. The circumstances which appear to be necessary to state them for the consideration of this question appear to be as follows. The present suit was commenced on the 4th June 1906, and it was originally instituted in the Court of the second Subordinate Judge of Shahabad. On the 22nd June 1906, the District Judge transferred the case to his own Court and it may be presumed that he acted in exercise of the powers conferred upon him by section 24 of the Code of Civil Procedure. On the 24th June following the suit was dismissed by the District Judge for want of prosecution. The plaintiff appealed to this Court, and on the 21st February 1907 a Division Bench allowed the appeal and sent back the case to the District Judge for rehearing. After the records had been returned to the District Judge, the case remained pending in this Court

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from the 7th June to the 15th June 1901. On the latter date, the District Judge transferred the case to the first Subordinate Judge as he himself was about to proceed on leave. On the 28th June the case was received by the Subordinate Judge, and the trial lasted from the 28th July to the 18th August 1904. No objection was taken by either party to the effect that the Subordinate Judge had no jurisdiction to try the case. It is now contended however, that the Subordinate Judge had no jurisdiction and, as the question is one of jurisdiction, we have allowed the appellants to take it although it had not been suggested at any earlier stage of the proceedings. The ground, upon which the objection is founded is that although under section 24 of the Code of Civil Procedure a District Court has power to withdraw any suit pending in a Court of first instance subordinate to it and to try the suit itself or transfer it for trial to any other subordinate Court competent to try it the District Court has no power after it has withdrawn a suit and placed it on the file to transfer it to any subordinate Court. In support of this position reliance has been placed upon the cases of *Jiwan Chowdhri Roy v. Bodhoo Jha*[1] and *Sita Ram v. Nand Lal*[2]. It has been argued, on the other hand, by the learned vakil for the plaintiff respondents that there are at least three answers to the contention of the appellants, namely, *first*, that the District Judge had inherent power apart from the provisions of section 24 of the Code of Civil Procedure, to transfer a suit from his Court to that of the Subordinate Judge; *secondly*, that if he did not possess such power the Subordinate Judge has not acted without jurisdiction, but has at least assumed jurisdiction in a irregular manner, and that consequently the defendants, who had acquiesced in the exercise of such jurisdiction ought not to be permitted now to question the legality of the proceedings before the lower Court; and *thirdly*, that the defect, if any, is cured by section 578 of the Code of Civil Procedure, inasmuch as the order of transfer might undoubtedly have been made by the Court if not by the District Court, and that if any objection had been taken in time before the Subordinate Judge

[1] (1886) 10 C. W. N. 442.

[2] (1890) I. L. R. 12 All. 330.

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the plaintiffs might also have avoided the defect by the presentation of a new plaint, as no question of limitation could possibly arise upon the admitted facts of the case. In our opinion the contention of the learned vakil for the plaintiffs respondents furnishes a complete and conclusive answer to the plea of want of jurisdiction advanced by the appellants. The case of *Imam Ali Khan* v. *Hardeo Roy*[1] is, no doubt, an authority for the proposition that when once a District Judge withdraws a suit to his own file for trial he is not competent, under section 24 of the Civil Procedure Code, to retransfer it to the Court from which the case had been withdrawn. The case of *Nur Khan* v. *Nasir Khan*[2] appears to go still further, as the learned Judges held that section 24 has no application to a case remanded on appeal to the Court of first instance. The cases of *Sukhraman* v. *Gangaram* and *Ram Lal* v. *Bhola Nath*[3] and *Nandan Prasad* v. *Bhagwan Das*[4] support the view that, where a District Judge has once exercised the powers conferred by section 25 of the Civil Procedure Code and transferred a case to his own Court from that of the Subordinate Judge, he cannot afterwards retransfer such case.

In these cases, however, the Court was not invited to consider whether, apart from the provisions of section 25 of the Civil Procedure Code, the District Court may not have authority to make an order of the description now in question before us. In our opinion, there is much force in the contention of the learned vakil for the plaintiffs respondents that as under section 9 of Act XII of 1887 the District Judge has administrative control over all the Civil Courts within the local limits of his jurisdiction, it ought to be held that the District Judge has inherent power to transfer a case from his own Court to that of the Subordinate Judge, especially where, as in the present instance, the order was made for the obvious benefit of the litigants and for the speedy determination of the matter. It has been ruled by this Court in the cases of *Panchanan Singha Roy* v. *Dwarka Nath Roy*[5] and *Hira Chand Bard* v. *Secretary of State*[6], that the Court of Civil

(1906) 3 C. W. N. 242 (1907) 1 C. L. J. 24 note
[1] (1899) I. L. R. 21 All. 230 [2] (1902) I. L. R. 24 All. 76
[3] (1898) I. L. R. 13 Bom. 651 [4] (1906) 3 C. L. J. 50
[5] (1905) I. L. R. 33 Calc. 627, 8 C. L. J. 67

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Procedure was not intended to be, and is not, exhaustive. As was observed in the case of *Kanai Lall Dutta* v. *Bolhamukh Das*[1], the Code does not affect the power and duty of the Court in cases where no specific rule exists, and the Court should act according to equity, justice and good conscience, though in the exercise of such power it must be careful to see that its decision is based on sound general principles and is not in conflict with those of the mandates of the legislature.

We agree entirely with the view indicated in the cases mentioned that the Courts in this country have, in matters of procedure, powers beyond those which are expressly given by the Code of Civil Procedure which bears Courteously in so far as it goes. The powers of the Court are not rigidly circumscribed by the provisions of the Code, and it is not possible to maintain the theory that the Court has no power to make a particular order, though it may be absolutely necessary in the interests of justice, unless some section of the Code can be pointed out as a direct authority for it. We are not unmindful that there are, perhaps, observations in the case of *Lyle* v. *Hyde Bridges & others* v. *Surat Kanta Acharji*[2], which may at first sight appear to militate against this view, and may lend some colour of support to the contention that a District Judge has no inherent power to transfer a case either from his own Court or from that of an officer under his administrative control, and that the power must be one conferred by Statute. The circumstances of that case, however, were of an entirely different description, and it was not intended there to decide the question which has been raised before us.

We are, therefore, disposed to hold that the District Judge had power, under the circumstances disclosed in the order-sheet, to make the order of transfer, which he did, and we arrive at this conclusion without hesitation, as the result of our view undoubtedly accords with what has been for many years past the well-established practice. We may further point out that, as was laid down by their Lordships of the Judicial Committee in the case of *Syed Tafhur-ool* v. *Roghoo Nath*[3], to proceed to recall and cancel an invalid order is not simply

[1] (1906) I. L. R. 33 Calc. 1004 at C. L. J. 441.

[2] (1895) I. L. R. 22 Calc. 875.

[3] (1871) 14 Moo. I. A. 80, 51.

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permitted to, but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to be wrong to the suitor, see also *Hurdeo Narain v. Purmanund Jha*[1], where the application of this principle is explained. We are unable to appreciate why this principle should not be applied to the case before us. If the District Judge, who has transferred a case to his Court, discovers that the very object, with which the case was transferred, is likely to fail by reason of unforeseen circumstances, it would be unreasonable to hold that it is not competent to him to withdraw the order and restore the case to the Court of the Subordinate Judge.

But it is not necessary to rest our decision on this ground alone, because the second and third branches of the contention of the plaintiffs respondents appear to us to be unanswerable. It was contended by the learned vakil for the respondents that, assuming that the District Judge had no power under the law to transfer a case from his Court to that of the Subordinate Judge, the defect would really affect the jurisdiction of the latter officer. Under section 15 of Act XII of 1887, the Subordinate Judge unquestionably possessed jurisdiction over the subject matter of the litigation. The only suggestion, which can be plausibly made, is that he assumed that jurisdiction in an irregular manner. The case, therefore, is not one of absolute want of jurisdiction, but is at best of an irregular assumption of jurisdiction. It was argued on behalf of the respondents that, in such a case as this, the appellants, who have never taken this objection at an earlier stage of the proceedings, were precluded from raising the question now.

In our opinion, this contention is well founded on principle and is amply supported by authority. In *Hurdeo Narain v. Purmanund Jha*[1] their Lordships of the Judicial Committee pointed out that, although jurisdiction cannot be conferred by consent where there is an entire absence of jurisdiction in a case which the Court is competent to entertain the suit if it were properly brought, the defendants may be barred by his own conduct from objecting to the irregularities in the institution of the suit; and, further, that when a Judge has an element

[1] (1906) 2 C. L. J. 306, 309.
[2] (1888) I. L. R. 9 All. 191; L. R. 13 I. A. 134, 144.

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jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbitrator and be bound by his decision on the merits, when these are submitted to him. There are numerous authorities, which establish that, when in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the judicial procedure, which, if objected to at the time, would have led to the dismissal of the suit. To the same effect are the observations of their Lordships in the case of *Hira Lal* v. *Kali Das Mukerji*[1], where their Lordships affirmed the view taken in *Ramesh* v. *Hira*[2] and pointed out that a waiver of a right to complain for want of jurisdiction is inapplicable only if there is an inherent incompetence in the Court to deal with the question brought before it and that no consent can confer upon a Court that power, which it never possessed. The distinction between an absolute want of jurisdiction and an irregular assumption of jurisdiction has, sometimes, been overlooked.

But the foundation of the distinction is fully explained in the Order of Reference to a Full Bench in the cases of *Sukh Lal Sheikh* v. *Isar Chand Jha*[3] and *Abdul Hakeem Sahib* v. *Yusuf Mahomed*[4]. In the first of these cases it was pointed out that jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it, *Rhode Island* v. *Massachusetts*[5]. Such jurisdiction naturally divides itself into three broad heads, namely with reference to (1) the subject matter, (2) the parties, (3) the particular question which calls for decision. Black on Judgments, section 215.

A Court cannot adjudicate upon subject matter, which does not fall within its province as defined or limited by law, this

(1887) I. L. R. 14 Cal. 401; 14 I. A. 11; I. L. R. 11 Mad. 26.

(1886) L. R. 13 I. A. 131; I. L. R. 9 All. 191.

(1905) I. L. R. 33 Calc. 98; 2 C. L. J. 241.

(1905) I. L. R. 33 Calc. 362; 2 C. L. J. 250.

[5] (1838) 12 Peters U. S. 657

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jurisdiction may be regarded to be essential for jurisdiction over the subject matter as a condition precedent to the acquisition of authority over the parties and, if a Court has no jurisdiction over the subject matter of the controversy, consent of the parties cannot confer such jurisdiction and a judgment made without jurisdiction in such a case is also void, null and void, it may be set aside by review or appeal or its nullity may be established, when it is sought to be relied upon in some other proceeding. See Hawes on Jurisdiction pages 12-16; Bennett on Estoppel section 110, and *Scott* v. *Sutherland*[1].

An entirely different class of questions, however, arises, when it is suggested that a Court in the exercise of the jurisdiction which it possesses has not acted according to the mode prescribed by the Statute. If such a question is raised, it relates obviously, not to the existence of jurisdiction, but to the exercise of it in an irregular or illegal manner. This distinction between elements, which are essential for the formation of jurisdiction and the mode in which such jurisdiction has to be assumed and exercised is of fundamental importance, but has not always been sufficiently recognised. That the distinction is well founded is manifest from cases of high authority. Thus, in *Pratt* v. *Hutchinson*[2], their Lordships of the Judicial Committee held that where there is jurisdiction over the subject matter but non-compliance with the process or procedure as essential for the exercise of jurisdiction, the defect might be waived. The same principle was adopted in *Re parte Pratt*[3] and *Re parte Hay*[4] which are authorities for the proposition that where jurisdiction over the subject-matter exists requiring only to be invoked in the right way, the party, who has invited or allowed the Court to exercise it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence. See *Lister Steamship Company* v. *Assam Bengal Railway*[5]. Although the objection that a Court is not given jurisdiction over the subject-matter by law, cannot be waived, *Lodge Swansea Canal Co.* v. *Neath Canal*

[1] (1890) 19 Atlantic Rep. 808.
(1874) L. R. 5 P. C. 436.
[2] (1884) 12 Q. B. D. 484.
[3] (1884) 13 Q. B. D. 977.
(1886) 1 L. R. Ir. Rep. 151.
(1886) 21 L. J. 64, 21 W. R. 438.

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yet defects of jurisdiction arising from irregularities in the commencement of the proceedings, may be waived by the failure to take objection at the proper stage of the proceedings, *Hukeem v. Hyde*[1], *Telford v. Spooner*, *Rhode Island v. Massachusetts*[2].

To put the matter from another point of view, it is only when a Judge or Court has no jurisdiction over the subject matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction, in all other cases, the objection to the exercise of the jurisdiction may be waived and is waived when not taken at the time the exercise of the jurisdiction is first claimed, *Hubert v. Lacoste*[3]. Black on Judgments, section 217.

On this ground, we must hold, as regards the second branch of the contentions of the respondents that the defendants have waived their right to take exception to the power of the Subordinate Judge to try the case under the authority of the order of transfer made by the District Judge. As regards the third branch of the contentions of the respondents, namely, that the objection is entirely devoid of all substance, it is manifest from other considerations. It cannot be disputed that the order of transfer might have been made by the High Court. If, therefore, objection had been taken by the defendants either at the time when the District Judge made his order or at the time when the Subordinate Judge dealt with the case on the merits, it would have been open to the plaintiffs to obtain an order from this Court, which would have cured the defect. It may further be pointed out that, if the objection had been taken at the time, it would have been open to the plaintiffs to present even a new plaint to the Subordinate Judge. Indeed, if the suit be assumed to have been instituted on the day when the Subordinate Judge took cognizance of it, it would not be open to objection on the ground of limitation, because, although the due date upon the bond expired on the 14th June 1882, the liability of the mortgagors was kept alive by acknowledgment made within twelve years from the date of

[1] (1878) 3 C. L. R. 476.
[2] (1838) 12 Peters U. S. 488.
[3] (1838) 12 Peters U. S. 34.
[4] (1842) 1 How. S. C. R. 675.

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the present suit. From every point of view therefore, it follows that the appellants are precluded from questioning, at the present stage, the validity of the proceedings before the Subordinate Judge. The two grounds taken on behalf of the defendants 1 to 7 consequently fail and must be overruled.

The second ground taken on behalf of defendants 1 to 7 involves the question of res judicata, and the first ground taken on behalf of the plaintiff raises practically the same question. But, although the parties are agreed that the decisions in the litigations of 1891 upon the mortgages of 1886 and 1887 operate as res judicata, they are not agreed as to the precise effect of those decisions. Defendants 1 to 7 contend that the effect is to preclude the plaintiff from enforcing the mortgage against the property purchased by the first two mortgagees in the suits of 1891. The plaintiff asserts, on the other hand, that the effect is to preclude defendants 1 to 7 from setting up their mortgages and thus to place the plaintiff in the position, which they would have occupied if the mortgages of 1886 and 1887 had been cancelled. To determine which of these contentions ought to prevail we have to examine the circumstances of these two litigations for as was pointed out by this Court in the cases of *Mussamat Bukhmanbee Koonwar* and *Hurnam v. Hurl Hurnam Misr*, to determine the question of res judicata it is essential to ascertain what were the rights inter se between the parties and what were alleged between them, and this must be done, not merely from the decree, but also from the pleadings and judgment.

Now, it appears that defendants 1 to 5 commenced suit No. 22 of 1891 to enforce their mortgage of the 13th December, 1886, and they instituted suit No. 21 of 1891 to enforce their security of the 5th May, 1887. In each of these suits they joined as parties defendants, not merely their mortgagors, who are now defendants 1 to 4, but also defendant No. 5, who is the mortgagee of 1886 and is the predecessor-in-title of the present plaintiffs. It will be observed that in the suit to enforce the security of 1886, the mortgagee of 1886 was a necessary party and an examination of the plaint in that case shows that he was brought

(1896) I. C. L. J. 397, 349. (1896) I. L. R. [illegible]

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on the record as a puisne encumbrancer interested in the mortgaged premises. He filed a written statement in which he challenged the validity of the plaintiff's mortgage and alleged that it was fraudulent and without consideration. He further pleaded that the plaintiffs had no valid cause of action as against him. Upon these pleadings, issues were raised one of which was, whether the bond was genuine and *bond fide*, and another was, whether the plaintiffs had any cause of action against that defendant. The Subordinate Judge who tried the case, found that neither party had proved that this particular defendant was in any way interested in the mortgaged property. He also held that the evidence adduced to establish the payment of consideration for the mortgage was not satisfactory or reliable and that the admission of the mortgagors that they had executed the bond alleged to have been executed was no evidence against the other defendants.

In this view of the matter, the Court dismissed the suit against the mortgagee of 1886, but made a decree against the mortgagors, as they had confessed judgment. The decree ordered the sale of the mortgaged property only in so far as the mortgagors were concerned. As we have already stated, the mortgagee decree-holders subsequently executed this decree and purchased the property at the execution sale. As regards the mortgage of 1887, the mortgagees the present defendants 5 to 8, commenced their suit against the mortgagors and the mortgagee of 1886. An examination of the plaint shows that it does not disclose any cause of action against the mortgagee of 1886. It will be observed that the mortgagee of 1886 was not a necessary party to enforce the mortgage of 1887, for as was explained by this Court in the case of *Sayyeda Bibee* v. *Hurdeo Dass*[1] in a suit to enforce a second mortgage, first mortgagee is not a necessary party. No doubt in one of the paragraphs of the plaint it was alleged that a portion of the consideration money for the mortgage of 1887, namely Rs. 1,872, had been applied in satisfaction of interest due upon earlier bonds of the 17th December 1884, the 29th March 1885, and the 2nd June 1887, but there was no express prayer that in respect of this sum,

[1] (1906) 1 C. L. J. 337, 351.

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the mortgage, though of 1887, might be treated as entitled to priority over the mortgage of 1880. The mortgagee of 1880 defended the suit on the ground that there was no valid cause of action as against him, and also asserted that the mortgage bond on which the suit was founded, was collusive and without consideration. Upon these pleadings, the Subordinate Judge framed issues, one of which was whether the bond in suit was genuine and *bona fide* and another was, whether the plaintiffs had any cause of action against the mortgagee of 1880. There was no issue raised as to whether the bond of 1887, if genuine, in respect of a portion of the consideration money entitles to priority over the bond of 1880. The Subordinate Judge found upon the evidence that there was nothing to show whether the alleged mortgagee of 1880 was really interested in the property in suit. He also held that there was no reliable evidence to prove the claim against them. In the view of the matter he dismissed the suit against the mortgagee of 1880, but made a decree against the mortgagors in consequence of judgment. The decree directed the sale of the properties included in the mortgage so far as the mortgagors were concerned. The mortgagee subsequently executed the decree and purchased the property at the sale held in execution. Upon these facts the learned vakil for Intendents 1 to 7 the mortgagees of 1887 and 1887, contends that the present plaintiffs, whose predecessor the mortgagee of 1887 was a party defendant to the suits of 1904, are precluded by the doctrine of *res judicata* from setting up the mortgage of 1887. In support of this position reliance is placed on the cases of *Sheo Prasad Singh v. Jhinku Singh*[1] and *Gopal Lal v. Bansee Dhar Lal*[2].

It is argued on the other hand by the learned vakil for the plaintiffs that as the suits of 1904 were barred as against the mortgagee of 1880 defendants 1 to 7 are now precluded from relying upon their mortgages of 1887 and 1887 which they had unsuccessfully attempted to enforce as against their predecessor in the two earlier litigations to which we have referred. In support of this position, reliance is placed

[1] (1902) I. L. R. 24 All. 418 (P. C.).
[2] I. L. R. 24 All. 429.

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upon the decision of their Lordships of the Judicial Committee in the case of *Ram Bahadur Singh v. Lucho Koer*[1]. After a careful examination of the authorities upon which reliance is placed on both sides we are clearly of opinion that the contention of the plaintiffs is well founded and must prevail. It is not necessary to examine minutely the decisions in *Sri Gopal v. Parth Singh*[2] and *Gopal Lal v. Beharee Pershad Chowdhry*[3] upon which reliance is placed on behalf of the defendants 5 to 8. The true foundation of the doctrine laid down in those cases was fully explained by this Court in the case of *Soorjeem Marwari v. Kirkender Persad*[4]. That principal to our mind has no application to the facts of the present case. It has been strenuously argued by the learned vakil for the defendants 5 to 8 that the mortgagee of 1881 was bound to establish his title, when he was brought before the Court in the litigations of 1884, and that his omission or failure to do so precluded him from resting upon that title in the present litigation. In our opinion, there is no foundation for this argument. So far as the security of 1887 was concerned the mortgagee of 1881 was, as we have already explained, not a necessary party to the suit to enforce it. No doubt he might be a necessary party, if the plaintiffs attempted to obtain priority in favour of their mortgage of 1887 over the mortgage of 1881. But although a suggestion to that effect was made in the plaint, there was no relief expressly claimed on that basis. The question was not even raised in the issues, and the suit ultimately failed by reason of the failure of the mortgagees of 1887 to establish the genuineness of their security as against the mortgagee of 1881. In the same manner so far as the security of 1881 was concerned, although the mortgagee of 1886 was a proper and necessary party, the suit to enforce the claim was unsuccessful by reason of the failure of the mortgagees of 1884 to establish the genuineness of the security as against the mortgagee of 1886. Under these circumstances, it is impossible to hold that merely because the mortgagee of 1886 failed to establish his security in the suits

(1881) I. L. R. 10 Calc. 301 at p. (1883) I. L. R. 10 Calc. 428
(1882) L. R. 9 I. A. 128 : I. L. R. 4 All. 236 : (1881) I. L. R. 3 All. 323
24 All Rep.—

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of 1891 such failure in any way precludes him or his representative from now relying on his title under the mortgage.

The decrees of dismissal, which were made in the suit of 1891, were decrees, which were based on the finding that the mortgages of 1881 and 1887 were not proved to be genuine and for consideration as against the mortgage of 1886. That finding, therefore, clearly operates as a *res judicata* in favour of the mortgage of 1886. The decrees which were made, were in accordance with and based on this finding. *See Peary Mohun Mukerjee v. Hara Chandra Banerjee*.[1]

On the other hand, the finding that there was no evidence to show that the alleged mortgage of 1886 was in any way connected with the mortgaged premises could not be taken as the basis of the judgment of the Court. The decrees might be said to be decrees in spite of that finding and when the suits were dismissed as against the mortgage of 1886 it was not open to him to challenge its validity. Beyond, the finding of the Subordinate Judge upon the question of the validity of the mortgage. In this view of the case that finding does not in any way operate as *res judicata*. *See Jogendra Nath v. Lucho Kumari*[2]; *Nanda Lal Banerjee v. Hafiz Muhammad Ishak*[3]; *Thakur Prasad v. Hanuman Prasad*[4]; *Peary Mohun Mukerjee v. Hara Chandra Banerjee*[1] and *Ganga v. Gaudia*.[5]

We are not unmindful that on a litigation between the present defendants 9 to 11 on the one hand as plaintiffs and defendants 1 to 4 as mortgagors defendants 5 to 8 as prior encumbrancers and defendant 12 (as subsequent mortgagee), as defendants on the other hand, the present defendants 9 to 8 succeeded in obtaining a declaration that not only in respect of their bond of 1886 but also in respect of a sum of Rs. 1,172 out of the consideration for their bond of 1887, they were entitled to priority over the bond of 1885. That question, however, might have been then decided between the present defendants 9 to

[1] (1897) I. L. R. 24 Calc. 930.
[2] (1884) I. L. R. 11 Calc. 301.
[3] (1886) I. L. R. 13 Calc. 17.
[4] (1891) I. L. R. 18 Calc. 647.
[5] (1892) I. L. R. 19 Calc. 41 at p. 852.

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5 and 9 to 12 it is clear that there was no controversy in that litigation between defendants 5 to 9 and 11, the predecessor of the plaintiffs, in respect of this matter. It cannot therefore be suggested that the decision in that litigation in any way operates as *res judicata* for as is now well settled, when an adjudication between defendants is necessary to give the appropriate relief to the plaintiff there must be such an adjudication and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants but for this, there must be a conflict of interest amongst the defendants, and the judgment must define the real rights and obligations of the defendants *inter se*, see *Hurrosoondery v. Watson Anand*[1], *Gokuldas v. Purno Singh*[2], *Balambhat v. Narayanbhat*[3], *Mahomed Amir Hussain v. Jewan Singh*[4] and *Thomas Ann v. Earl of Shrewsbury*.[5]

No materials have been placed before us to show that the decision in the suit, to which we have referred was given under circumstances which could possibly make it operate as *res judicata* between co-defendants. We must, consequently, hold that the decision in the suits of 1901, brought by defendants 5 to 9 to enforce their mortgages of 1881 and 1887, operate as *res judicata*, and as those suits were dismissed, rightly or wrongly against the mortgagee of 1880, the defendants 5 to 9 are not entitled to rely upon those mortgages as against the plaintiffs who now represent the mortgagee of 1880. The true test to be applied to a case of this description is are the defendants 5 to 9 entitled after their defeat in the litigations of 1901 to enforce their mortgages of 1881 and 1887 against the mortgagee of 1880? If they are not, and if their remedy was by way of an appeal against the adverse decisions of 1901, they are obviously precluded from falling back upon their mortgages of 1881 and 1887. The effect of their purchase in execution of their own decrees has been to give them a title against their mortgagors alone, and as the suits in which these decrees were made, were dismissed against

[1] (1903) I. L. R. 30 Calc. 1. [3] (1901) I. L. R. 25 Bom. 74.
[2] (1905) I. L. R. 32 All. 346. [4] (1905) I. L. R. 28 Mad. 437.
[5] (1843) 3 Hare 627.

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the mortgagee of 1886 they have not obtained a valid title against him or his representative in interest. The Subordinate Judge was in error upon exactly the same matter. He proceeds to take account so that the effect of the dismissal of the suits of 1891 was to leave the parties in the position, where they would have stood if the mortgages of 1886 had never been pleaded as a paramount title against these suits. This view is obviously untenable. The mortgagee of 1886 was brought before the Court, he challenged the validity of the mortgages of 1884 and 1887 as he was entitled to do, and his contention was overruled. Under these circumstances, the conclusion appears to be irresistible that the present plaintiffs may rightly claim the full benefit of the dismissal of the suits of 1891 and are entitled to enforce their security against the properties in the hands of defendants 1 to 5 precisely as if the mortgages of 1884 and 1887 had a real existence. The second ground advanced on behalf of defendants 1 to 5 ought not to be entertained and the first ground taken on behalf of the plaintiffs must consequently prevail.

The third ground taken on behalf of defendants 1 to 7 raises the question whether they are not entitled to priority over the mortgage of 1886, which the plaintiffs seek to enforce, in respect of the sum of Rs. 1,612 which formed part of the consideration of their mortgage of 1887. It is established by the evidence that out of the sum advanced by the defendants 1 to 7 upon the mortgage of 1887 Rs. 610 was paid in satisfaction of the interest due upon a prior mortgage of the 15th December 1885 executed in favour of persons now represented by defendants 2 to 6, and the sum of Rs. 1,002 was applied in discharge of interest due on a bond of the 20th March, 1886, and a third sum of Rs. 750 was applied in satisfaction of the interest due on a bond of the 3rd June, 1886. Upon these facts, it is argued by the learned vakil for defendants 1 to 7 that to the extent of these three sums of money which were applied in satisfaction of interest due on three bonds earlier than that of the present plaintiffs, they are entitled to a declaration of priority. In support of this position, reliance is placed upon the cases of *Ananda v. Jankee*[1] *Jewan Singh v. Lachmi Narain*

[1] (1894) L. R. 21 I. A. 126; I. L. R. 16 Calc. 1035.

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Gopal Chander Seemanty v. *Hemanta Chander Haldar* [1] and *Jumbu Gooroo* v. *Venkanath Sweet Sitwaiker* [2].

It is argued on the other hand, by the learned vakil for the plaintiffs respondents that there are two objections to the right claimed by the defendants each of which is fatal to their contention. It is pointed out, in the *first* place, that the decision of the question is barred by the principle of constructive *res judicata* and it is contended in the *second* place that upon the admitted facts, the principle of subrogation has no possible application. In our opinion the argument advanced on behalf of the appellants is not well founded, and their contention must be overruled. It is manifest that this claim for priority might and ought to have been set up in the litigation of 1891 in which the mortgage of 1887 was enforced (Jones on Mortgages sections 1139 (1) and (3) (b), 6th edition, Vol. II, pages 503 and 526). Indeed, as we have already pointed out, the mortgagees did set out in their plaint circumstances sufficient to form the foundation of the claim now advanced. It was not however, pressed, and the suit appears to have been dismissed so far as the mortgage of 1887 was concerned. There is, therefore, considerable force in the contention that it is no longer open to the mortgagee of 1887 to set up in the present litigation the claim to priority which might and ought to have been adjudicated upon in the litigation of 1891. See *Sri Gopal* v. *Parth Singh*, *Baboo Pearee Singh* v. *Hanuman Pershad*, *Kameswar Pershad* v. *Rajkumari Ruttun Koer*. [3] It is not necessary, however, to rely upon this ground as a question might arise as to whether the doctrine of constructive *res judicata* is applicable where the subject-matters of the two suits are different. See *Sri Gopal Marwari* v. *Rachmaldeo Persad*. [4] We are satisfied, however that the second branch of the contention of the learned vakil for the respondent must be sustained. That contention, in substance, is *this*, namely, *that* the doctrine of subrogation entitles a person to the benefit of a mortgage in favour of a stranger, either when he is

[1] (1888) I. L. R. 16 Calc. 523.
[2] (1896) I. L. R. 19 Bom. 89.
[3] (1892) L. R. 20 I. A. 136: I. L. R. 14 All. 460.
[4] (1889) L. R. 16 I. A. 137: I. L. R. 16 Calc. 692.
[5] (1902) L. R. 30 I. A. 234: I. L. R. 30 Calc. 79.

2 (1920) L. J. C. L. J. 337, 353.

compelled to pay it off to protect an interest of his own in the property mortgaged or by an agreement; and *secondly*, that in any event, the entire amount of a senior encumbrance must be paid before subrogation can be claimed.

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The first of these points raises the question of the nature of subrogation and the principle on which it is founded. That principle is thus expounded by Mr. Justice Sutherland in *Ellsworth v. Lockwood*: 'Subrogation or substitution by operation of law to the rights and interests of the mortgagee in the land is by redemption, and redemption or payment of the mortgage debt after forfeiture by the terms of the mortgage contract, so that really the subrogation or substitution by operation of law arises or proceeds on the theory that the mortgage debt is paid. If the holder of a bond assigned it to a party claiming a right to redeem, the latter is subrogated by the assignment to the mortgage debt and mortgage security and there is no room or occasion for subrogation by operation of law.' Consequently it may be said, in general, that to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. The foundation of the rule was elaborately examined in a recent case, *Watkins v. Nelson*[1] in which Mr. Justice Cobb stated the rule to be that a Subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which, in default of default by the debtor he would be bound to pay or where he had some interest to protect, or where he advanced the money under an agreement express or implied, made either with the debtor or creditor that he would be subrogated to the rights and remedies of the creditor.' This distinction between the position of a person, who pays off a mortgage to protect an interest of his own and the position of another, who claims subrogation by agreement, is well marked and is said to have been borrowed from the Civil Law which

(1870) 12 S. V. 80

[1] (1901) 112 Georgia 31; 36 S. E. 374

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recognised two kinds of subrogation, namely "legal subrogation" which took place of right and without any agreement as such by the creditor and as a matter of equity and 'conventional subrogation" which was applied, where an agreement was made with the person paying the debt that he would be subrogated to the rights and remedies of the original creditor. See Howe's Studies in the Civil Law, 1905, page 240 see also *Bank v Tillman*[1], where the doctrine of conventional subrogation is examined. The case of *Cousins Executors v Texas Real Estate Association*[2], where it was held that the purchaser of an equity of redemption who had paid off the first charge, might use the first mortgage as a shield against mesne encumbrances, the payment being made by a person who is under no personal obligation to pay, only to protect his own interest, furnishes an illustration of the former class of cases. The case of *Lourdha Nath Mitter v Hari Mohun*[3], furnishes an illustration of the second class of cases, whereas the decision of the Judicial Committee in *Bradshaw Nunn Hawkins v Lazarus Dent*[4] shows, the line dividing the cases of cases, where no bargain is made when the money is advanced and cases where the money is advanced on the understanding that the creditor should be subrogated to the position of the mortgagee. It is only in the first class of cases that the question of intention to keep the mortgage alive arises. The doctrine of subrogation is not applied to the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation being under a legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or properties of his own. This doctrine is nowhere more clearly and concisely explained than in the judgment of the Supreme Court of the United States in *Home Life Insurance Company v Modlagh*[5], where the principle laid down by Chancellor Johnson in *Godden v Brown*[6] and by Chancellor Walworth in *Sandford v*

[1] (1809) 1 Cranch 33, 2 U. S. R. 704.

[2] (1884) L. R. 14 I. A. 126; I. L. R. 10 Calc. 1033.

[3] (1906) I. L. R. 3 Calc. 1143.

[4] (1901) L. R. 30 I. A. 91; I. L. R. 28 Calc. 174.

[5] (1887) 124 U. S. 525.

[6] (1843) Speers, Eq. (S. C.) 37.

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McLean[1] was adopted as well founded in reason. That principle is, that subrogation as a matter of right is never applied in favour of a mere volunteer. Legal subrogation into the rights of a creditor for the benefit of a third person takes place only for his benefit who, being bound to satisfy the claim of a prior creditor or for the benefit of a purchaser, who extinguishes the encumbrances upon his estate, or of a co-obligor or surety, who discharges the liability of an heir, who pays the debts of the successor *Mercy facilis*. Any one, who is under no legal obligation or liability to pay the debt, is a stranger, and, if he pays the debt, he is a mere volunteer, *locus of a stranger*. To the same effect, are the decisions in *Copis v. Hoppe*[2] *Hall v. Farmers' Loan and Trust Company*[3] and *Watson v. Watson*[4]. The learned vakil for the respondents placed reliance upon passages from Story on Subrogation, sections 499-514, which fully support his contention and the position is further strengthened by the observations contained in Jones on Mortgages, section 871 (6th Edition, Vol. I, page 494), and Rorer on Subrogation, sections 702-707. If these doctrines which appear to us to be based on principles of justice, equity and good conscience, are applied to the case before us, it becomes manifest that the claim put forward on behalf of defendants 1 to 3 is entirely unfounded. When a portion of the money advanced by them was applied in part satisfaction of the interest due on earlier bonds, it could not be said that they were compelled to make the payment to protect an interest of their own in the property mortgaged to them, much less could it be suggested that there was any agreement, express or implied, upon which a claim for subrogation could be founded. There was a second answer, however, as the learned vakil for the respondents has pointed out, to this claim for subrogation. The money was applied only in part satisfaction of the claim for interest due upon earlier bonds, and it is difficult to appreciate how, under such circumstances, a claim for subrogation could arise. The person, who makes the payment, cannot, by simply paying

[1] (1852) 3 Paige N. Y. 122.
[2] (1863) 14 N. J. Eq. 214.
[3] (1860) 116 N. Y. 400.
[4] (1860) 33 Kansas 470; 7 Am. Rep. 267; (1885) 34 Am. Rep. 95.
[5] (1876) 92 Wis. 208; 34 Am. Rep. 6.

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the interest as it accrues or paying or discharging a portion of the interest which has already accrued, claim a right of subrogation. He must pay the entire amount of an encumbrance which is senior to his own. This doctrine is based upon a perfectly intelligible principle, for as we have already explained, subrogation is by redemption, and unless there is redemption, it is not easy to perceive how subrogation can take place. *Merritt* v. *Howard*[1], *Street* v. *Beal*[2], *O'Reilly* v. *Hall Lumber* v. *Neff*[3]. It is obvious that the contrary view would lead to endless embarrassment. It would enable a person, who has made a part payment of the interest due on a mortgage security, to claim subrogation, would be thus occupy the position of a joint mortgagee with the person whose claim is partially satisfied? What would be his position with regard to interest subsequently accruing upon the prior mortgage and how are the rights to be worked out if, as in the case before us, the prior mortgagees have already sued and enforced their security? The rule, therefore, that before one creditor can be subrogated to the rights of another the demand of the latter must be entirely satisfied, so that he shall be relieved from all further trouble, risk and expense, is based upon good sense and ought to be adopted as applicable to the case before us. Stephen on Subrogation, sections 14, 19, 25, 70 and 83, Harris on Subrogation section 29. To use the language in *Hemingway's Trust*[4] "I would not subserve the ends of justice to consider the assignment of an entire debt to a surety as affected by operation of law, when he had paid but a part of it and still owed a balance to the creditor, and the Court would not countenance such an anomaly as a *pro tanto* assignment, the effect of which would only be to give distinct interests in the same debt to both creditor and surety." This view is in no way inconsistent with that taken by the learned Judges of the High Court in *Lambu Gomar* v. *Fakhruddin Ismail Talyarkhan*[5]. On the grounds, therefore, that

[1] (1855) 11 Gray (Mass) 270; 71 Am. Dec. 713.
[2] (1864) 16 Iowa 69; 85 Am. Dec. 514.
[3] (1877) 6 Woods C. C. 645; 18 Fed. Cases 702.
[4] (1858) 24 Georgia 346; 71 Am. Dec. 135.
[5] (1907) 2 Harris & Gill (Maryland) 91.
[6] (1899) I. L. R. 18 Bom. 80.

the position of defendants 5 to 7 did not entitle them to claim the benefit of the principle of subrogation, and that actual payment was not sufficient to entitle them to succeed to the rights of the prior encumbrancer by subrogation, we must overrule the third ground upon which the decision of the Subordinate Judge is sought to be assailed.

The fourth ground, upon which the decision of the Subordinate Judge is challenged on behalf of defendants 5 to 7, is that the plaintiffs are not entitled to claim interest at the rate specified in the mortgage of 1880, inasmuch as on the 18th June, 1889, they entered into a compromise with their mortgagors, by which they undertook to reduce their claim for future interest to 6 per cent. per annum. In answer to this contention it is argued on behalf of the plaintiff respondents that the compromise in question is inoperative in law, as it was not registered under section 17 of the Registration Act. The facts, so far as a statement of them is necessary for the decision of this point, are not disputed before this Court. It appears that in 1880 the present defendant 14, the mortgagee under the bond of 1880, sued the mortgagors for recovery of interest due at the time of institution of that suit. On the 18th June, 1889, a petition of compromise was filed on behalf of the parties. It recited that though Rs. 1,000 had been paid Rs. 100 in case that the balance of Rs. 5,000 was to be paid within the 11th February, 1890, and that upon failure to do so, interest would run upon the decretal amount at the rate of 6 per cent. per annum. The compromise further contained a term by which the mortgagee agreed to accept future interest on the entire amount of debt covered by the bond, at the rate of 6 per cent. per annum. The compromise was recited in the preamble to the terms, which was made in that litigation. The decree, however, was based on that portion only of the compromise, which relates to the subject-matter of that suit, as is required by section 375 of the Code of Civil Procedure. No decree was made in respect of the covenant by the mortgagee to reduce the claim for future interest to 6 per cent. annum. Upon these facts it is contended on behalf of defendants 5 to 7 that the compromise is operative though not registered, because it was recited

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in the decree. In support of this position reliance is placed upon the cases of *Bindesri Nath* v. *Ganga Saran Sahu*[1] and *Raghubans Man Singh* v. *Mahabir Singh*[2]. It is argued, on the other hand by the plaintiffs respondents that the petition of compromise, in so far as it related to matters beyond the scope of the suit, in which it was filed, required to be registered, and this view is sought to be supported by a reference to the cases of *Prasad Das* v. *Lakshmi Das*[3], *Muthayya* v. *Venkatarayudu*[4], *Bishambar Nath* v. *Kalpataru Pande*[5] and *Pachu Muthayyal* v. *Ponga Kunhi*[6]. In our opinion, the contention advanced on behalf of the plaintiffs respondents is well founded and must prevail. The point is really concluded by the decision of their Lordships of the Judicial Committee in *Prasad Das* v. *Lakshmi Das*[3], the true effect of which was explained in *Bishambar Nath* v. *Kalpataru Pande*[5]. After a careful examination of all the authorities on the subject, we adopt the view put forward in that case. A petition of compromise, in so far as it relates to properties in suit, does not require registration under section 17 of the Registration Act, and the lower, in so far as it gives effect to the settlement touching such properties operates as a decree. If it gives effect however to the settlement touching properties extraneous to the litigation, the lower is to that extent, clearly without jurisdiction and is inoperative. In relation to these extraneous properties, the parties, must fall back upon the petition itself, which cannot, without registration, effectively declare or create title to immovable property exceeding Rs. 100 in value. The same view was adopted by this Court in the case of *Asit Chandra Sikdar* v. *Ram Chandra Mandal*[7]. The case of *Raghubans Man Singh* v. *Mahabir Singh*[8], upon which much stress was laid on behalf of the appellants, appears to be based upon a misapprehension of the judgment of their Lordships of the Judicial Committee in *Prasad Das* v. *Lakshmi Das*[3]. With all respect for the learned judges, who decided that case, we find ourselves entirely unable to

(1897) I. L. R. 24 All. 171; L. R. 29 I. A. 8.
(1903) I. L. R. 25 All. 78.
(1880) I. L. R. 2 All. 701; I. L. R. 22 Mad. 500.
(1903) I. L. R. 27 Mad. 553.
(1905) I. C. L. J. 988.
(1906) I. L. R. 29 Mad. 66.
(1885) I. L. R. 11 Calc. 784.
(1903) I. L. R. 25 All. 78.

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adopt their view, and we are supported in our conclusion by the decision of the Madras High Court in *Pichu Muthu and* v. *Kuppa Reddiar*[1], *Muthayya* v. *Venkatachalam*[2] and *Ashuta Ram Rai* v. *Nathmal*[3]. If the view adopted by the learned Judges of the Allahabad High Court in *Raghubans Nar Singh* v. *Hira Singh*[4] is well founded, litigants may, as was pointed out in *Krishna Kali* v. *Annapurna Dasi*[5], evade with impunity the provisions of the Registration Act, the Stamp Act, the Court fees Act and the Civil Courts Act which last defines the jurisdictions of different classes of Courts. We are unable to persuade ourselves to hold that this is what was intended by their Lordships of the Judicial Committee. It has not been disputed, and it cannot be disputed that the petition of compromise in question purported to extinguish title to or interest in immovable property of a value exceeding Rs. 100. We must consequently hold that it is inoperative, because it was not registered. The fourth ground taken on behalf of defendants 5 to 7 cannot consequently be supported.

The first ground taken on behalf of the plaintiffs respondents, who have preferred a separate appeal relates to the question of *res judicata* and has already been disposed of in connection with the second ground taken on behalf of defendants 6 to 7.

The second ground taken on behalf of the plaintiffs raises the question whether defendants 5 to 7 would not be bound to account for the profits received by them during their possession of the mortgaged properties after their purchase at the execution sale and whether these defendants are entitled to have interest at the contract rate upon their securities calculated after the dates of their respective decrees. Both these contentions would seem to be well founded, and it is sufficient to refer to the case of *Gunga Pershad* v. *Jhunda Singh*[6] which entirely in accord with the decision of their Lordships of the Judicial Committee in *Ajudhia*

[1] (1898) I. L. R. 20 Mad. 365.
[2] (1902) I. L. R. 25 Mad. 7
[3] (1903) I. L. R. 26 All. 78
[4] (1904) I. L. R. 27 All. 7
[5] (1905) I. L. R. 32 Cal. 1
[6] (1882) I. L. R. 4 All. 7

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Marsarv v. Baiken Pershad[1]. It is not necessary, however, to deal with this point in detail because, as we have already held, defendants 1 to 7 are not entitled to rely upon their mortgages of 1884 and 1887 as against mortgage of 1886, which the plaintiffs seek to enforce. The plaintiffs are entitled to enforce their security precisely to the same manner as if the mortgages of 1884 and 1887 had never been created.

The only point taken on behalf of defendants 9 to 12 raises the question, whether they are not entitled to their costs in the Court of first instance as well as in this Court. It is manifest that the case of the plaintiffs as against them has entirely failed and the learned vakil for the plaintiffs has not seriously resisted the claim for costs put forward on behalf of defendants 9 to 12.

The result therefore is that Appeal No. 540 of 1904 preferred by defendants 5 to 7 fails, and must be dismissed. Appeal No. 501 of 1904 preferred by the plaintiffs must be allowed, and the decree of the Subordinate Judge modified to the extent, namely, the words "subject to the prior mortgage charge of the defendants 5 to 8 and" and "the mortgage decree of the defendants Nos. 5 to 8 and" shall be expunged. The cross-objection of defendants 9 to 12 must also be allowed, and they will be entitled to their costs in the Court below. So far as the costs of this Court are concerned, defendants 5 to 7 must pay the costs of the plaintiffs respondents in Appeal No. 540 of 1904 and the plaintiff appellants in Appeal No. 501 of 1904, must pay the costs of defendants 9 to 12. Only one decree will be drawn up in the two appeals, and, to avoid future difficulties, the decree must be self-contained without any reference to the decree of the Subordinate Judge.

Henwood J. I concur. *Decree modified.*

Note.—Sometimes a mortgage will contain a clause whereby the party to whom it is advanced has power to put a third person in the event of default by the debtor he would be bound to pay, where he has some interest to protect or where he advances the money under an agreement entered or supposed made either with the debtor or creditor. It may be said in general that to entitle one to invoke the equitable right of exoneration he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and

[1] (1888) L. R. 15 I. A. 67; I. L. R. 11 Calc. 322.

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hold an [illegible] such a relation [illegible] protected [illegible] paying off the first charge [illegible] mortgage as a shield against [illegible] The [illegible] when the [illegible] he under- [illegible] of the [illegible]

The [illegible] simply performs [illegible] covenant and pays off a charge which he has undertaken [illegible] was not bound to pay [illegible] the earlier mortgagee [illegible] Gur Narain v. Sheolal Singh [illegible] 1290 [illegible] L. R. 46 All. 102 [illegible] takes with the vendor with the money left with him by the latter, to satisfy [illegible] of the later mortgagee, he cannot afterwards by discharging an earlier mortgage hold that up as a shield against the mortgagee whom he had undertaken to pay [illegible] money left at his disposal [illegible] in fact [illegible] of the third mortgage also which was as a matter of fact the earliest in point of time, paid off the amount [illegible] the first [illegible] he was under [illegible] made by [illegible] to satisfy [illegible]

The contention that [illegible] the ends of justice [illegible]

Present: [illegible] for John Ross and
Mr. Ameer Ali.

SHAMU PATTER ... APPELLANT,

AND

1 ABDUL KADIR RAVUTHAN and Others
2 ABDUL RAJAK SAHIB and Others } RESPONDENTS.

Reported in L. R. 29 I. A. 218; I. L. R. 25 Mad. 607 P. C.; 2 C. L. J. 596 P. C.; 16 C. W. N. 1060 P. C.

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June 19, 20,
July 24.

On May 10, 1899 the first two defendants executed in favour of the appellant's predecessor in title an hypothecation deed of the usufructuary to secure Rs. 10,000 and interest. In June, 1899 they created further charges thereon under deeds to which the said hypothecation deed was recited. Subsequently certain decree-holders against the said defendants attached the lands and thereafter the appellant preferred to claim under Civil Procedure Code, 1882, s. 278, on the basis of the deed in his favour and his claim was upheld to the extent of Rs. 4,015 only.

On July 18, 1902 the appellant sued for the sale of the lands comprised in his deed, and on March 27, 1903, the attesting creditors sued for a declaration that the said deed was void against them as fraudulent and without consideration. The suits were heard together, and after evidence relating to the consideration had been completed a fresh issue was framed as to whether the deed was valid under the Transfer of Property Act, s. 59 it appearing from the evidence that the executants of the deed had only acknowledged and not actually affixed their signatures in the presence of the attesting witnesses.

The judgment of their Lordships was delivered by

Mr. Ameer Ali. These are two consolidated appeals from certain judgments and decrees of the High Court of Madras, dated January 28, 1908, affirming the decrees of the Subordinate Judge of South Malabar at Palghat; and the sole question for determination in both cases turns upon the meaning to be attached to the word "attested" in s. 59 of the Indian Transfer of Property Act (IV of 1882), the first clause of which provides that, where the principal money secured is one hundred

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to pass or expends a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

The appellant Shamu Pattar as the representative of one Appu, deceased, brought a suit on July 15, 1902, in the Court of the Subordinate Judge of South Malabar to enforce a mortgage alleged to have been executed in favour of Appu by the Rawuthan defendants. The other defendants to Pattar's action were certain other creditors of the Rawuthans who are respondents in the present appeals, and who challenge the mortgage on the ground inter alia that it was a fraud on creditors and without consideration. The settlement on the mortgaged properties appears to have been previously executed at the instance of Pattar and he accordingly brought a suit for same in 1900 in the Court of the District Munsif of Palghat for a declaration that the mortgage transaction was fraudulent and without consideration and ineffective so far as their rights were concerned. This suit was ultimately transferred to the Court of the Subordinate Judge and was tried with Pattar's action, the evidence in one being taken as evidence in the other.

The trial began, as appears from the order sheet on September 7, 1905, arguments were heard on November 6 and 17 and judgment was reserved. On the same date a question arising from the evidence of the witnesses to the mortgage, that they were not present at the execution but had put their names on the document on the subsequent day, was raised by the Subordinate Judge framed a supplemental issue in these terms: "Is it proved that the mortgage deed was validly executed under the Transfer of Property Act?" And on November 9, finding that the document was invalid under that section he dismissed Pattar's suit save as regards a personal decree against the Rawuthans, and by a separate judgment decreed the suit of the creditors.

From these two decrees Pattar appealed to the High Court of Madras, which has upheld the Lower Court's decisions.

In the present appeals the judgment of the Courts in India have been challenged on two grounds: first that the Subordinate

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Judge acted irregularly and without jurisdiction in framing an issue after the close of the arguments and deciding the case on it, and secondly that the Courts are in error in holding that the word 'attested' in s. 59 of the Transfer of Property Act imposes the witnessing of the actual execution of a document.

With regard to the first point their Lordships are of opinion that s. 151 of the Civil Procedure Code (Act XIV of 1882) which is applicable to the proceedings, is conclusive. That section reserves to the Court 'full power to pass any decree and make any order (including orders as to costs and the costs of any commission issued for taking evidence) as may be necessary for bringing to a determination the matters in controversy between the parties.' The Subordinate Judge was therefore fully empowered to frame the issue on which he decided the case.

Even if there had been no such express provision in the Code, their Lordships consider every Court having civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties.

The substantial ground, however, on which the decrees of the High Court are impugned has reference to the interpretation put upon s. 59 of the Transfer of Property Act. It is contended on the authority of *Ex parte Gorton*[1] and *Jones v. Smith*[2], which was followed in 1850 in *Wakely v. Trustees of the British Museum*[3], that the learned judges of the Madras High Court were in error in holding that the word "attested" in the section under reference means the witnessing of the actual execution of the document by the person purporting to execute it.

The construction put in those cases on the word "attested" occurring in s. 5 of 29 Car. 2, c. 3 (the Statute of Frauds), no doubt supports the contention of the appellant that attestation

[1] 2 Ves. Sen. 434. [2] 1 Ves. 11.
[3] 6 Beav. 310.

upon the acknowledgment of the executant in order that to being present at and witnessing the execution. They rested, however, to the due execution of wills, and though the language of Lord Hardwicke in *Ongley v. Hooper*[1] was authority wide to cover deeds, his interpretation has not passed without question in later cases. The eminent judges who decided *Bergeon v. Bergeon*[2] and *Jones v. Soares*[3] themselves doubted the correctness as well as the expediency of widening the meaning of the word "attested," but felt overborne by authority. In the latter case the exact question for determination was whether a testator's declaration before three witnesses that it is his will is equivalent to signing it before them. Parker C. J. began his judgment with the following important observation:—

"I confess, if this had been *res integra*, I should doubt whether the testator's declaration is a proper execution within the 5th clause, because, I think, no inducement that it would tend to weaken the force of the statute, and let in perjuries and perjuries."

While C. J. observed that he was not convinced by his own mind that the testator's acknowledgment was sufficient, but he added "authorities bear me down and I must yield." And the Master of the Rolls pronounced the extended construction to be "a danger of determination and destructive of those bars to the statute erected against perjury and frauds." The learned judges, however, felt bound by the previous decisions and, proceeding on the principle of *stare decisis*, decided in favour of the will then passed before them, leaving to legislative determination of a section of the Indian statute relating to a totally different subject.

As the question involved in these appeals is of considerable importance and there seems to be some divergence of opinion between the Indian High Courts, their Lordships do not think it fit to pass altogether unnoticed the other authorities cited at the Bar as well as to the well-reasoned judgments of the learned judges in the Madras High Court.

In *Leonard v. Indian*[4], which was decided in 1845, the question for decision was whether the signatures of two witnesses

[1] 2 Ves. Sen. 456. [2] 1 Ves. 11.
[3] 3 Moo. Ind. Ap. 305.

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who had subscribed a will at different times, but the first had acknowledged to the second that he had signed the same, amounted to sufficient compliance with the provisions of s. 7 of the Indian Wills Act of 1865. Lord Brougham, in delivering the judgment of the Judicial Committee, observed that "The Statute of Frauds (29 Car. 2, c. 3, s. 5) requires the will to be signed by the testator, in the presence of the witnesses, nevertheless, the construction put upon that important provision has been that an acknowledgment is equivalent to a signature. How far this artificial interpretation was justified on principle we need not now stop to inquire, though it might well be suggested that to see an act on the person of a witness and to acknowledge having done it when the witness was not present, are two entirely different things, as different as the witnessing a fact or act, and the witnessing a confession of that fact or act." And after referring to the hesitation with which the decision had been arrived at in *Ex parte Southern*, he proceeded "To carry one step further a construction which so great a weight of authority lamented and showed to have been fictitious at its inception."

The later cases are also unanimous in the interpretation of the words "attestation" and "attested." In *Jones v. White*, Sir J. Wigram (1841) said that "attestation means that persons shall be present and see what passes, and shall, when required, bear witness to the facts." In 1850 Lord Campbell C.J. in *Ex parte Phillips*, reiterated the same rule as regards the word "attested," that the witnesses should be present as witnesses and see it signed by the testator. And the point was given effect to in the House of Lords in *Lord H. v. Spottiswoode*. "The Lord Chancellor summed up the conclusion in these words. 'The party who sees the will executed is in fact a witness to it, if he subscribes as a witness he is then attesting witness.'"

The meaning of the words "attest" and "attestation" was also before the Courts under the Bills of Sale Act of 1878 (41 & 42 Vict. c. 31, ss. 8 and 14) and the interpretation put on them in *Ex parte Phillips*, and *Jones v. White*, has invariably been followed.

* 1 Yes. 11.
† 3 Rob. 315, 317.
‡ 6 E. & B. 140.
§ 1 A. & E. 140.

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Sect. 50 of the Indian Succession Act X of 1865 was referred to in support of the appellant's contention regarding the meaning of the word 'attested' occurring in section 3 of the Transfer of Property Act. The phraseology of the two sections is quite different, as different in fact as the object of the two statutes.

Sect. 2 of Act XXV of 1870 (the Indian Wills Act) declared that, after the passing of that Act (24 Geo. 3 'shall cease to have effect' except to a limited extent within the territories of the East India Company. In s. 3 the word 'attested' is left out, but it is provided that testator's signature 'shall be made or acknowledged by him in the presence of two or more witnesses present at the same time.' The latter words gave rise to the question in *Wyman v. Paton*. Act X of 1865, the Indian Succession Act, has substantially taken the place of the Indian Wills Act of 1870 and it embodies the rules which regulate the law applicable in India to cases of intestate or testamentary succession, excepting as regards Mahomedans, for the most part of this Act was made applicable. Similarly by the Hindu Wills Act Sect. 50 provides for the due execution of what are called unprivileged wills and paragraph 3 declares "The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

It will be noticed that the word 'attested' which was omitted in s. 2 of the Act of 1870 is reintroduced in s. 3 and it is expressly provided that attestation may be effected on the acknowledgment of the testator. Had the word 'attested' by itself conveyed the meaning that attestation upon the acknowledgment of the executant was sufficient, there would have been no reason for making an express provision in the section. The

[1] 3 Mad. Ind. Ap. 203.

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inference to be drawn from it was obvious. The Legislature considered it expedient in the case of wills to permit of witnesses "attesting the document," in other words, of testifying to its due execution, on the acknowledgment of the testator that it was in his hand, and, as the word 'attest' was not sufficient to validate such attestation, introduced an express provision to that effect. Sect. 68 of the Indian Evidence Act (1 of 1872), which declares that "if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution," appears to their Lordships to indicate that the Indian Legislature used the word "attested" in the sense in which it has been construed through a series of decisions in the English Courts. Sect. 59 of the Transfer of Property Act, requiring that a certain class of cases a mortgage "can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses" could only mean that the witnesses were to attest the fact of execution. Any other construction to their Lordships' opinion would remove the safeguards which the law clearly intended to impose against the perpetration of frauds.

The Calcutta High Court has in three cases arising under s. 59 taken the same view as the Madras High Court has expressed in the present case. And although in one instance the Bombay High Court had extended the meaning of the word "attested" to include attestation upon acknowledgment, in *Ram* v. *Laxman*[1] the learned judges, on the authority of *Hurdeo* v. *Appadoo*[2], arrived at the same conclusion as the two other Presidency High Courts. The Allahabad High Court, however, in the case of *Ganga Ba* v. *Mussa Sunder*[3] has taken a different view. The learned judges seem to consider the introduction of the words "personal acknowledgment" in s. 50 of the Indian Succession Act as an interpretation of the word "attest." They say as follows:—

"It seems to us reasonable to suppose that the interpretation put upon the word 'attest' in that section, in the absence of good technical or substantial reason to the contrary, should be

[1] I. L. R. 23 Bom. 64. [2] 10 Cl. & F. 346.
[3] I. L. R. 26 Allah. 60.

taken to be the meaning in which the word is used in s. 59 of the Transfer of Property Act."

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With respect their Lordships are unable to follow the reasoning. As already observed, the provision as to attestation upon the testatrix's personal knowledge was given a separate consideration as to the sense and interpretation of the word "attest." In fact it was proposed that the witnesses might attest the document as witnessing the actual execution upon the personal acknowledgment of the testatrix of the execution. But that, in their Lordships' judgment affords no warrant for extending the meaning of the word "attest." Nor do their Lordships agree with the view expressed by the learned judges regarding the policy of putting a large construction on the word in consequence of the "moral nature of the country." These very moral considerations their Lordships conceive make it necessary that "the barriers against perjury and fraud, to use the language of the Master of the Rolls in *Ivy v. Gardiner*," should not be removed upon speculative considerations.

On the whole their Lordships are disposed to think that the judgment of the High Court of Madras is right, and that these appeals ought to be dismissed and they will humbly advise His Majesty accordingly.

Solicitor to appear for respondent in appeal No. 31 of 1911: Solicitor for appellant in appeal No. 32 of 1911: Solicitor for the Transfer of Property Act. The provision seems to be [illegible] the subscribing witness [illegible] It is the witness who presumes to [illegible] the testatrix [illegible] as attesting witnesses [illegible] *v. Jadunath*, 9 C. W. N. 607; I. L. R. 32 Calc. 750.

Where a deed is executed by a purdanashin lady, of the attesting witnesses before whom the lady does not appear but who are well acquainted with her voice to appear [illegible] the deed, though they were unable to see their faces [illegible] *Fatima v. Pinder Ram*, 19 C. W. N. 901; P. C., 22 C. L. J. 161; 39 P. L. R. 67; All. 478 P. C. See also *Harnarayan v. Gennar*, 13 C. W. N. [illegible]

Where a deed contains at the foot the names of four witnesses, two of whom are illiterate and who say that they [illegible] were attested by the executant in their [illegible] and they [illegible] *Tula Naqui v. Pare Mahomed*, 2 C. L. J. 70 n.

[illegible]

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[Appeal from A. O. D. No. 1357 of 1897 against the decree, dated the 22nd of June 1897, of the Subordinate Judge of Howrah.]

1898 March 25.

The following judgments were delivered:

MACLEAN, C.J. In the suit out of which this appeal arises, the plaintiff seeks to obtain a declaration of his right to certain property and to recover possession of it from the defendants. He had executed a deed of relinquishment in favour of the defendants, in which he alleged that in respect of that property he was the benamdar of the defendants, and he now seeks to have it established that this deed of relinquishment was a colourable deed, which he executed to save his property from being sold in execution of decrees obtained against him by his creditors. He alleges that no intended fraud was not carried out because he won the appeals he preferred on the suits with his creditors and so he desires to get back possession of the property. The defendants traverse his allegations. The Lower Appellate Court has given the plaintiff a decree.

The defendants appeal on two grounds—(1) that the plaintiff is estopped from alleging the deed of relinquishment to be colourable and (2) that the plaintiff is not entitled to rescind a deed he executed for the purpose of perpetrating fraud.

There is clearly no estoppel in this case. The defendants were in no way misled and thereby induced to do anything or alter their position. Further the rule laid down by this Court is that, when the intention to commit fraud has not been carried into effect, a beneficial owner is entitled to sue for a declaration that a deed of transfer executed by him is void. This rule has no doubt been attacked by the Madras High Court in the case of *Devasahayam Ayyathorai v. Chandra Nayagar*[1] and a different rule has been laid down by the Bombay High Court

[1] (1897) I. L. R. 20 Mad. 320.

on *Khoja appeals Patterja* but I see no reason to dissent from the rulings of this Court on the subject. I would therefore dismiss this appeal with costs.

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MITTER J. On the 24th November 1881 the plaintiff executed a deed of relinquishment in favour of the first defendant, by which he declared that two properties in dispute in this litigation belonged to the latter. On the 11th January 1882, the first defendant executed a conveyance in favour of the second defendant in consideration of a half share of these properties as if he was the beneficial owner of the whole and dealt with them. The plaintiff now seeks to avoid the conveyance on the ground that the deed of relinquishment was not valid in law and that therefore it was valid both upon the first defendant and that consequently the second defendant did not acquire any right under his purchase. It has been found as a fact that the second defendant was a *bona fide* purchaser for value without notice, and that at the time he made his purchase, the first defendant was in a position to deal with the properties. The accuracy of this finding has not been challenged before this Court. The defendants however, contended in the Courts below and they have repeated the objection in this Court, that the plaintiff is not entitled to any relief because at the time when he executed the deed of relinquishment he did it for the express purpose of defrauding his creditors. The plaintiff admits that shortly before the deed was executed, some persons were calling him to account but he says he had obtained decrees against them against which he preferred appeals. He apprehended that during the pendency of the appeals, the decree holders might take out execution, and with a view to protect his properties he executed the deed of relinquishment as a shield against those creditors. As a matter of fact, no execution was ever taken out and the appeals instituted by the plaintiff were ultimately successful, with the result that the alleged claims of the creditors were held to be unfounded and were dismissed. Under these circumstances, the plaintiff contended that his conduct was not such as to prevent him from establishing the truth and recovering possession of the properties. The Courts below have concurrently adopted this view of the matter and have given the plaintiff a decree for possession. In

* (1887) I. L. R. 13 Bom. 705

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defendants have appealed to this Court, and on their behalf it has been contended that as the plaintiff executed the deed of relinquishment in order to defraud his creditors, he has no standing in a Court of equity, which will not extend relief to a fraudulent grantor. In support of this proposition reliance has been placed upon the cases of *Cheesapeake v. Pottapeti* [1], *Beaumont v. Brabrook* [2] and *Barrow & Others v. Thacker Pogose* [3]. The learned vakil for the appellant has further argued that the contrary view taken in the case of *Mussa Lall Mitter v. Amirudda Neb Hug* [4] where it was held that it is open to a party to show that a document executed, but not carried into effect, is colourable, was not necessary for the purposes of that decision and cannot be supported upon the authorities. The learned vakil has invited us to refer the question raised to a Full Bench for decision. There can be no doubt that there has been considerable diversity of judicial opinion upon the matter, and it is necessary therefore to examine the various authorities and the principles upon which they are founded.

One of the earliest cases in these provinces in which the question was raised as to how far the grantor of a fraudulent deed is entitled to ask a Court for relief is that of *Ram Indur Das Rai v. Roop Narain Ghose.* [5] In that case *A*, who was indebted to *B*, executed a mortgage in his favour, but with a view to defraud other creditors antedated it by eight years. *A* further gave a warrant of attorney to *B* to enable *B* to confess judgment on behalf of *A* in a suit by *B* to enforce the security as against *A*. The mortgage was intended to be benetrous and was granted with a view to screen the property from the creditors of *A*. *B* also executed an engagement in favour of *A*, which vested the true nature of the whole transaction. Subsequently, *B* sued upon the mortgage, obtained a decree upon confession of judgment, had the property put up to auction, purchased it himself and instead of holding as trustee for *A*, later on conveyed it to a stranger. *A* sued to recover the property. The Sudder Court dismissed the suit upon two

[1] (1887) I. L. R. 11 Bom. 706.
[2] (1890) I. L. R. 15 Mad. 378 affirmed on appeal (1892) I. L. R. 20 Mad. 324.
[3] (1897) I. L. R. 25 Mad. 520 (1899) I. L. R. 23 Calc. 400.
[4] (1841) 2 Sel. Rep. 115. New Ed. 119.

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grounds—*first*, that the plaintiff could not recover the property from a *bona fide* purchaser for value without notice, and *secondly*, that the plaintiff could not ask to be relieved of the consequences of his own fraudulent act. With regard to the second ground, the Court observed that it is a general principle of law that a man entering into a fraudulent agreement with another of this nature to defeat the rights of third parties creditors for instance, shall not have it for his representatives to recover against the consequences of his own fraudulent act, though the creditors may, and if his partner in the fraud takes advantage, ever so dishonestly, of the power which has been put into his hands, a Court of Justice will not relieve on behalf of him or his heirs. With regard to this case two points deserve attention, namely, *first*, that apparently the fraudulent object in view was not carried out, and, *secondly*, that if the plaintiff had been allowed to recover the property, either the first transferee from him would have had the sum paid by him or the second transferee, who had taken without notice of the secret agreement, would have lost his money.

A similar question was raised in *Ramasami Ayyangar v. Collector of Vizagapatam*[1] and sued to recover property from *B*, which had been conveyed to him under a secret engagement that he was to hold it for the benefit of *A*. The Sudder Court dismissed the suit on the ground that the sale through arrival, was effected by a deed duly drawn out, attested and registered possession given by mutation in the Revenue Registers, and all this done to deceive the public and to evade a rightful process of law. The decision was rested on the ground that no person can take advantage of his own wrong. It may be observed that the suit was resisted not only by *B*, but also by persons who had purchased at a sale held by the Collector to whom *B* had given the property as a security for due payment of the Government revenue.

In the case of *Rahim Khan v. Khaja Ahmed Khan*[2] the cases just referred to were followed. *A* transferred properties to *B* with a view to save them from the claim of his creditors. The creditors took out execution, attached the properties and were successfully met with a claim by the transferee. *A* then sued to recover the property from *B*, and a purchaser claiming under

[1] (1846) Beng. S. D. A. 120. [2] (1849) Beng. S. D. A. 270.

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him. A Full Bench of the Sudder Court held that the Court will never sanction or in any way give the aid of its authority to a party who, by his own admission founds his claim upon fraudulent agreements entered into in order to defeat the ends of justice. It may be remarked that the fraud intended to acquire the rights of the creditors had been successfully accomplished and also that the transferee from B claimed to be a *bona fide* purchaser for value without notice.

In the case of *Ramessur Roy v. Juggernath Pershad Mullick* [1], A sued to recover property to which he claimed title by purchase from C. It was found that B was the real owner of the property and had executed a conveyance in favour of A, complete in form but nominal in intention and effect, with a view to escape the pressure of the claims of his creditors. The Sudder Court held that A was entitled to succeed, and observed that a party having made a transfer in fraud cannot reclaim property from the transferee upon tender of proof that the documents were not *bond fide*, nor to trust the acts of the transferee as null and void. It will be observed that the plaintiff was a *bona fide* purchaser for value from A, and on that ground alone was entitled to succeed. At the same time, there was nothing to show that the fraud contemplated had been carried into effect.

In the case of *Anon. v. Sookey Jadee Sirdar* [2], A sued to recover property, which was alleged to have been purchased by him in the name of B with a view to save it from his creditors. The majority of the learned Judges held that the suit was not maintainable as the claim was founded on a deed drawn out *bonâ fide* in order to deceive creditors. The dissentient Judge however, held that as the contemplated fraud had not been carried out the plaintiff was entitled to succeed, and he pointed out that if the suit was decreed instead of creditors of the plaintiff being defrauded, they must be benefited, because if the property be declared to belong to plaintiff, his creditors may take it in satisfaction of their claims. I may point out that the view thus indicated accords with the opinion of the Supreme Court of the United States in *Brick v. Brittin* [3], namely, that in an action to recover money deposited with the defendant, it is no

[1] 1 Beng. S. D. A. 274. [2] 2 Beng. S. D. A. 305.
[3] (1850) 14 U. S. 209.

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valid defence to urge that the plaintiff made the deposit with the intent to cheat and defraud his own creditors, because as soon as the plaintiff recovers, his creditors are likely to be benefited by the money.

In *Bhawany Sunker Pandey v. Parma Koer* the Sudder Court relied upon the authority of the cases of *Jaun Bebee v. Roy Nuraut* and *Bykaut Ojha v. Ram Jaun* that no relief will be given to a party suing for the purpose of setting aside a *benami* sale, avowedly made with the fraudulent intention of defeating the rights of other parties who had a claim against the property. The report does not show whether the plaintiffs had suggested in the scheme which had been planned with a view to enable them to evade payment of their just debts.

In the case of *Ram Sunker Sandil v. Ahmad Nabi Khan*, the Sudder Court held, following the decision in *Bhawany v. Jugmooth Pandey*, that a plaintiff was entitled to succeed as against a defendant, who admitted that he had made a fictitious transfer in favour of the plaintiff with a view to evade payment to his own creditors. It will be observed that in this case the plaintiffs were allowed to succeed, although it was found that they were not the beneficial owners and were cognizant of all the particulars connected with the scheme for defrauding the creditors. There was nothing to show that the intended fraud had been actually practised against the creditors and yet the Court held that the ostensible transfer could not be legally disputed. Substantially the same view was taken in *Ram Lall v. Kishen Chunder*. These cases, however, are inconsistent with the earlier decision of the Sudder Court in *Bykaut Ojha v. Ram Nuraut Koer*, where the defendants, who had collusively created a fictitious tenure in favour of the plaintiffs in order to evade their liability under a decree passed against them in another suit, were allowed to prove and successfully the previous collusion in answer to the unfounded claim of the plaintiffs.

A view similar to the one taken in the last case was adopted by the Sudder Court in *Kishen Chunder Chuckerbutty v. Surendra*

(1850) Beng. S. D. A. 68. (1856) Beng. S. D. A. 42.
(1854) 2 Sel. Rep. (Ben. New Ed.) 160. (1857) Beng. S. D. A. 71.
(1861) Beng. S. D. A. 270. (1862) 1 Beng. L. R. 43.

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Chatterjee.[1] It was ruled upon the authority of *Roberts* v *Roberts*[2] and *Wentworth* v *Wentworth*[3] that, although a deed may be avoided on the ground of fraud the objection must come from a person neither party nor privy to it, for no man can allege his own fraud to invalidate his own deed. The defendant admitted in answer to the claim that they had executed a deed of sale in favour of the plaintiffs, but pleaded that it was merely fictitious transaction entered into for the purpose of defeating the claims of parties who held decrees against the vendors. It was contended that, as the persons through whom the plaintiffs derived title were in *pari delicto* with the defendants the latter should not be debarred from pleading the fictitious character of the transaction. The Sadr Court held that a plea of this description could not be heard in a Court of Justice, and observed that it was well that it should be understood that, when people execute fictitious deeds for the purpose of defeating their creditors, avoiding an attachment, or effecting any other fraudulent purpose, they place themselves completely at the mercy of the person in whose name the fictitious conveyance is made out, and that their plea of the transaction being a fraudulent one will not be attended to. This case therefore proceeded upon the doctrine laid down by Lord Mansfield in *Wortley* v *Watson* that it was immaterial whether the fraud is alleged as a matter of defence or as a ground of action because "no man shall set up his own iniquity as a defence any more than a cause of action."

The cases analysed above are based on the doctrine that, where a party admits that he has made a fictitious transfer of his property to another with a view to effect a fraud, but asks to have his act enforced the Court would refuse relief and would leave the parties to the consequence of their misconduct dismissing the claim, when the suit was brought by the real owner to get back possession of his property and refusing to listen to the defence, when he set it up in opposition to the person whom he had invested with the legal title. The rule thus stated was subsequently adopted in the cases of *Henry Sackett Hawkins* v *Kate*

[1] (1859) Beng. S. D. A. 1619. [2] (1819) 2 B. and Ald. 367. [3] 2 W. Bl. 477.

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Gouree Mookerjee [illegible] *Sundry People* v. *Hem Lal Roy*[1] and *Arshak Chunder Sein* v. *Ramsoondree* In some of these cases, no doubt, the fraudulent object had been carried into effect, while in others the attempt had failed but it was expressly stated in *Hemy Sendar Mookerjee* v. *Ama Charan Mookerjee*[2] that it was immaterial whether any creditor of the transferor were actually defrauded, and in *Gokul Sonar* v. *Hem Lal Roy*[3] Jackson J with the concurrence of Sir Barnes Peacock C J, observed that, as Courts of Justice are engaged for the protection of honest suitors and the enforcement of just claims, they are not available as machinery to aid the carrying out of schemes of fraud This view might seem to receive some apparent support from the observations of the Judicial Committee in *Lewis* v. *Mackenzie*[4], *Nilmoney Singh* v *Mahendra Nath Roy*[5] and *Kinnaird* v. *Trollope*[6] In none of these cases however did the question arise directly for consideration, nor was it actually decided It may be added that the Courts went so far as to hold that the rule was applicable not only to the parties to the transaction but also to persons, who take under the real owner, whether as heirs or purchasers see *Jankee Koer* [illegible] v. *Tirbunge Dass Furreedoonnissa* v. *Indurjeet*[7] *Gooli Hussein* v. *Imam*[8] *Purkhooi Sahoo* v. *Radha* [illegible] and *Ameer Ali* v *Bagul Ameer Ali*[9] In the case last mentioned however, Sir Charles Hobhouse J expressed considerable doubt as to the correctness of the view and assented to it on the ground that it was supported by a considerable body of authorities and might be regarded as desirable in the circumstances of the country

About this time the Judicial Committee decided the case of *Ram Sarup Singh* v. *Hanwant Singh*[10], in which it was held that, where two out two of the defendants in their answer made a statement in respect of an alleged mortgage transaction

[1] (1864) W R Gap. 355
[2] (1866) 6 W R 287
(1867) 7 W R 118
[3] (1870) 13 M I A 85, 102
14 W R P C 44
(1869) 13 W R P C 14
12 B L R P C 5
[4] (1873) L R 5 H. L. 480
[5] (1865) 3 W R 62
[6] (1878) 3 W R 6
(1882) 10 W R 25
(1883) 10 W R 21
(1887) 14 A R 87
(1887) 14 M I A [illegible]
W R P C 14

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with the object of defeating the unfounded claim of the plaintiff, it was open to either of these two persons in a subsequent litigation in which they were arrayed as plaintiff and defendant, to plead that the statement in the joint answer in the former suit was false and intended as a fraud on the third party. Lord Justice James observed in delivering the judgment of their Lordships that it is open to a mortgagor to deny that the money the receipt of which is formally acknowledged under his hand and seal was actually advanced, and that he could do so notwithstanding that he made a contrary statement in a previous litigation with a third party. For a pleading by two defendants against the suit of another plaintiff can never amount to an estoppel as between them. A similar principle was adopted by the Judicial Committee in the case of *Hanmant Gadgil Appaji v. Hanmant Lakshman*[1]. These sections were relied upon by Sir Richard Couch C. J. in *Sreenath Doss Chowdhry v. Bunsee Sahoo Doss*[2] as establishing that, even where the object of a *benami* transaction is to obtain a shield against a creditor, the parties are not precluded from showing that it was not intended that the property should pass by the instrument creating the *benami* and that in truth it still remained with the person who professed to part with it. The same view was also taken in the cases of *Phool Kuer v. Gour Narain Doss*[3], *Sreenath Roy v. Bunsidhur Pykar*[4], *Gopeenath Nag v. Juhurlal Pykar*[5], *Sahebzada Sahib v. Sahebzadi Sahiba*[6] and *Hafiz Hamid v. Hussain Sadat*[7]. Later on, many of the authorities on the subject were reviewed in *Shamdasi Mitra v. Surendra Nath Bose*[8], and the learned Judges, while approving of the rule laid down by Sir Richard Couch in *Sreenath Doss Chowdhry v. Bunsee Sahoo Doss*[2], indicated that there might be substantial distinction between cases in which the fraud had been carried into execution and cases in which the contemplated fraud had not gone beyond the stage of intention. This distinction was subsequently adopted as well founded in the cases of *Abdul Ghafur Khan v. Abdul Latif Khan*[9]

[1] (1870) 13 M. I. A. 585; 15 W. R. P. C. 16; 6 B. L. R. 293.
[2] (1874) 21 W. R. 422.
[3] (1872) 18 W. R. 455.
[4] (1874) 20 W. R. 115.
[5] (1874) 23 W. R. 42.
[6] (1875) 24 W. R. 301.
[7] (1891) 9 C. L. R. 64.
[8] (1905) I. L. R. 33 Calc. 460.
[9] (1905) I. L. R. 33 Calc. 962, note.

Note Podmar

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It is clear, therefore, that although in the present case a very stringent rule was laid down to the effect that a person is not entitled to make a profit of his own fraud, the rule arose from the consequences of his own misconduct, and the more immediate rule that the real object of the transaction ought to guide the Court in determining the real rights of the parties. Upon this rule we have seen that the Court will not relieve where the intended fraud has been carried into effect; the Court will not allow the fraudulent person to rely upon his fraud when he has once put it out of his power to undo what he has done by giving his estate away to a purchaser who has no notice of the fraud. In our opinion this rule covers the present case and ought to be applied to it. It is obvious that where the fraudulent purpose has actually been accomplished it is impossible to apply the maxim "*In pari delicto, potior est conditio possidentis.*" But where the fraud has not been accomplished, on what principle of legitimate argument can it be said that a party is to be allowed to profit by a fraud which he has attempted to commit, but which has been defeated? Such a rule would be a premium to fraud. A person who has attempted to defraud another, and has failed in the attempt, is not entitled to claim the assistance of the Court to enable him to carry out his fraudulent intention and it was willing to aid him in carrying that intention into effect. But if the circumstances are altered and *B* dishonestly sets up a title to the property in question which is greater than that which *A* could assert, or relies upon some defence which the Court can refuse to allow *A* as against *B*, whose registered title has been valid and effectual for a much longer period than that of *A*. To refuse relief in such a case would be to encourage a double fraud on the one side *B* to prevent the single fraud on the other *A* from succeeding. It further appears to be clear that, if we accept the view we hold that fraud or intention is the sole determining element, irrespective of the question whether or not that intention has been accomplished, the result would be that the grantor would be precluded even though he

(1880) 1 L R 2 [illegible]
(1889) 1 L R 27 [illegible]
(1901) 1 L R 28 Calc 75
(1880) 30 Mo 476

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abandoned his fraudulent purpose. I am aware of no case where the theory, which underlies the rule in its most stringent form has been more vigorously explained than in *Cook v. Wood*, where Chief Justice Hensley observed as follows: "A contract, the purpose of which is to protect the debtor against the just claims of creditors is an immoral act. Such an effect is immoral to social policy. In transactions and to them effects such contracts are accounted as pernicious as any of those which the law has declared to be criminal. In these regards, we are thus to be distinguished from contracts, which have been often judicially pronounced not on account of any pernicious tendency, but on account of their inconsistency with sound policy and good government. They are held to the binding and commercial honesty and integrity should be subjected to the bar of retaliatory." The conclusions of fraudulent conveyances may be correct to be just, but it seems to me that the consequences may be easily carried too far. I can quite understand that a deed executed to effect a fraud ought not to be sufficient to deprive the party of the assistance of the Court in enforcing his rights, and if he can show that the fraudulent purpose has been abandoned or given up and the debts to the full value of the property conveyed, the fraud should be regarded as purged, see *Croft v. Jones*[1] and *Brookbank v. Brookbank*[2], in the former of which cases Davies J., on observing the judgment of the Supreme Court of Massachusetts observed as follows:—

"It would seem equally clear that when a party, who has transferred property to delay or defraud creditors abandons his fraudulent purpose, repudiates the whole or part thereof, and seeks to reinstate himself in the possession of his property in order to pay his creditors, he may do so. It cannot be that the other party, who has been a participant in the fraudulent transaction, by reason of such participation should be able to hold the property, the possession of which he had so acquired and thus prevent it from being devoted to its legitimate uses."

If we apply these principles to the case now before us, the inference is irresistible that the plaintiff ought to succeed. At the time when the plaintiff executed the deed of relinquishment

[1] (1896) 8 N. J. Law R. [2] (1888) 148 Mass. 67; 18 N. E. R. p. 674
[2] (1906) 6 Mass. 350.

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he might be troubled from creditors, who had obtained decrees against him. These decrees, as I have already stated, were subsequently reversed, and it was established that the claims, which they had set up were unfounded. Upon what principle can it be maintained that the plaintiff was guilty of fraud which disentitles him to protection from a Court of Equity? I am fortified in the view I take by the reasoning contained in the decision in the case of *A* v. *C* and *B* for slander. *B* to prevent himself entered property to *C*, who agreed to reconvey *B* let into the world. Subsequently *C* betrayed the trust, and refused to reconvey the property. The Supreme Court of New York held that *C* must reconvey. Johnson J. observed that as the plaintiff in the slander suit was completely defeated, when a lawful claim no creditor, and the conveyance could not become fraudulent because it was made to hinder a person who had performed a claim which had no foundation in law or justice, but the validity of which was not established by a judgment of a Court of Law. To extend the operation of the rule to a case of this description does not appear to me to be defensible upon any principle of general nature of law or of public policy. The learned Judge considered that the view taken by Sir Richard Couch in *Nundo Lall Bose* v. *Issur Chunder Mullick* is based upon the decision in *Symes* v. *Hughes*, which, as well as the case of *Taylor* v. *Jones*, has been adopted by Kay J. in *Ex parte Mercer*. He also referred to a passage from Lord Mansfield's judgment in *Cadogan* v. *Kennett*, Cowp. 434, to which the learned counsel for the plaintiff in error referred in support of the view that the distinction between cases where a bond executed or a conveyance made has been delivered to the obligee or grantee and cases where the bond or conveyance has not been sent for the purpose for which it was executed. With all respect for the learned Judge, I am unable to adopt his conclusion as sound in principle, and there are obviously high authorities in support of the contrary view. Thus in *Reed* v. *Reed* a person was allowed to recover property which had been assigned away in order to avoid service in the office of a Sheriff, when it was found that

(1) 3 Johns. N. Y. 375. (2) 3 B. & C. 627.
(3) 1 W. Bl. 532. (4) 1 Ves. Jr. 56.
(5) L. R. 6 Eq. 65. (6) 1 Johns. N. Y. Rep. 276.

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he was excused service not because he actually pleaded that he had no property in the country, but because he constructively paid the fine. Lord Hardwicke drew a distinction between a case in which the unlawful intention had been carried into execution and a case in which no fraud was actually committed. The same distinction is supported by the cases of *Cornwall v. Hartford*, *Thomas v. Thomas*, *Thomas v. Sorrell*, and was recognized in *Law v. Law*, *Lord Townshend's Case*, and in the observations of Lord Westbury in *Taylor v. Taylor* and *Lady Hastings*. Sir Thomas Plumer M. R. was aware of the earlier authorities, and conceded that the fact that no deed had been executed upon and the voluntary object had not been carried into execution was an element to be taken into consideration. To the same effect are the cases of *Bovey v. Smith* and *Worrall v. Jeffs*, in which persons were allowed to recover property, which they had alienated, in order to avoid the effects of contracts for a felony, which the grantors supposed they had committed but which they had not and could not have committed.

It is manifest, therefore, that there is a considerable body of authorities in favour of the view indicated in *Symes v. Hughes*, upon which Sir Richard Kindersley relied, that where the purpose for which a conveyance was made was not carried into execution and nothing was done under it, the conveyance ought to be set aside, the doctrine of locus poenitentiae being applicable. I think the assignee of his right to recover the property back from the assignee, who has given no consideration for it. There is ample authority that in such cases equity will not permit the assignee to work a fraud and retain the property himself by setting up the Statute of Frauds as a defence. *Hook v. Kaye*, *Symes v. Hughes*, and *Collins v. Lewis*. I may further observe that the distinction between the effect of a fraud merely intended and a fraudulent purpose actually accomplished has been recognized by

(1740) 2 Atk. 2nd ed. 59 Eng. Rep. 808.
* (1741) 2 Atk. 2nd ed. 26 Eng. Rep. 567.
(1813) 2 Cox, 2nd ed. 29 Eng. Rep. 746.
* (1868) 20 L. T. 6.
(1870) L. R. 2 H. L. Sc. 2.
(1871) 24 L. T. N. S. 504.
L. R. 213.
* 1860) 30 Beav. 208.
* 1872) L. R. 13 Eq. 345.
* 187 L. R. 6 H. L. 475.
** (1873) L. R. 7 Ch. 469.
** (1859) 4 De G. and J. 16.
** (1857) 1 De G. and J. 482.

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the Indian Legislature in the Indian Trusts Act (II of 1882), sect on 84 of which provides as follows:—"Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferee is not as guilty as the transferor, or the effect of permitting the transferee to retain the property is not to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

As pointed out in Story on Equity Jurisprudence, vol. I, section 298, the test is whether the parties are in pari delicto and it appears to me that, when the fraudulent intention has not been carried into effect and the criminal transferor dishonestly acts up a faith for himself, the parties cannot rightly be regarded as in pari delicto. I am not unmindful that the contrary view has been maintained by eminent Judges, see for instance *Bellamy* v. *Bellamy*[1], *Hamilton* v. *Royse*[2] and *Wilson* v. *Wilson*[3]; but for the reasons I have already stated I am unable to adopt the view laid down in those cases. I may add that this view was adopted by the Allahabad High Court in *Parmeshri Saran* v. *Jang Bahadur*[4] which perhaps goes too far, and by the Bombay High Court in *Hanoo* v. *Narsu*[5] and *Bibee* v. *Arsibai*[6], the last mentioned of which cases was followed by this Court in *Premnath Ram* v. *Ram Nihal*[7]. I am not satisfied that the Madras High Court did really take a different view in the cases of *Rangasami* v. *Venkatachari*[8] and *Doraiswami Ayyathurayyan* v. *Chinnan Tayyan*[9]. On a careful examination of the judgments in *Chenvirappa* v. *Pallappa*[10], *Rangasami* v. *Venkatachari*[8] and *Doraiswami* v. *Chandra*[9], I am rather inclined to hold that they dissent only from the rule laid down by Sir Richard Couch in somewhat broad and unqualified terms in *Security Bond Cases, In re*[11], but are really in harmony with the principles embodied in *Gurdyal Singh* v. *Rao Raj*[12] and *Ram Rup* v. *Hanwanta*[13].

(1807) 3 Swanst 466
[1] (1838) 2 Jr Eq Rep 191
[2] (1842) 5 Ir Eq Rep 555
[3] (1877) I L R 1 All 661
[4] (1878) I L R 2 All 440
(1884) I L R 18 Bom 372
[5] (1894) 8 C W N 929
[6] (1900) I L R 25 Bom 333
[7] (1907) I L R 30 Mad 329
(1887) I L R 11 Bom 708
(1874) 21 W R 422
[8] (1906) I L R 29 Cale 902

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Brito.[1] If, however, the learned Judges intended to affirm a rule inconsistent with the decisions last mentioned, I regret I am unable to adopt such view. With all respect I am unable to see how the view taken by this Court enables a party to a deed to say, by way of an execution creditor may have been defrauded, to get himself reinstated, when his purpose has been served. On the other hand, it seems to me that, if the Court refuses to aid a plaintiff, who has made a fictitious transfer of his property from an improper motive, but has not carried into effect his intention, the Court really becomes an instrument to aid the defendant in his fraudulent claim to possession contrary to the real agreement with the plaintiff. I fail to appreciate how in such an event a Court of Equity can rightly hold that the plaintiff must suffer because he had an improper motive, though no one has suffered by reason thereof and the conduct of the defendant is beyond question unconscionable, see *Lobo* v. *Brito*.[2]

There is another aspect of the case before me, which calls for notice. The plaintiff did not execute a conveyance in favour of the defendant but gave him a deed of relinquishment. Now it is well settled that title to land must pass by admittance, when the Statute requires a deed, see *Harrison* v. *Hardy*[3] and *Wilson* v. *Knubley*[4]. It is obvious therefore that the mere execution of the deed of relinquishment and creates any title in the defendant. No doubt under certain circumstances the plaintiff might be estopped from setting up a title in himself, but as the document and the purchaser from him were both aware of the true nature of the deed of relinquishment they cannot set up a title by estoppel. How has then the title which was vested in the plaintiff, passed away from him? The deed of relinquishment does not operate as a conveyance or even as a contract to convey the interest of the plaintiff nor does it operate by way of estoppel. As observed by their Lordships of the Judicial Committee in *Hirannat Koer* v. *Hirannat Lodar*[5] there is no other way, in which, it can

(1888) I. L. R. 27 Calc. 231

(1867) 1 I. R. 21 Eq. 23

(1904) 102 Am. St. Rep. 904

1903 42 L. R. A. 502

(1857) 11 W. R. 387; 16 W. R. P. C. 69; 9 M. I. A. 283.

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operate. I must hold accordingly that the [illegible] has still an enforceable [illegible] and there is nothing to prevent him from recovering the property [illegible].

The result, therefore, is that the decree made by the Court below must be affirmed and this appeal dismissed with costs.

[illegible] *[illegible] dismissed.*

[illegible] the party suffers a decree to be passed against him [illegible] which is only a part of the fraudulent scheme. [illegible] 337. [illegible] purpose of the transfer is not carried out, the transferee is not estopped from [illegible] is not entered into by the transferee with a third person. *[illegible] Subbarayar*, I. L. R. 31 Mad [illegible], 18 M. L. J. 151. [illegible] See *[illegible]* [illegible] W. N. [illegible]

Where [illegible] the land. [illegible] 21 C. W. N. 149. A document whereby a benami purchaser at a Court auction [illegible] his claim to the property purchased without conveying any title thereto is a release. *[illegible] v. [illegible]*, 3 L. W. 231.

Present: LORD MACNAGHTEN, LORD DAVEY, SIR ANDREW SCOBLE AND SIR ARTHUR WILSON.

PETHERPERMAL CHETTY.

MUNIANDY SERVAI

Reported at L. R. [illegible] 551 P. C.; L. R. [illegible] 1898
7 C. L. J. 529 P. C.; 12 C. W. N. 562 P. C.

One Muniandy Mantry was the owner of a grant known as the Tankkyan grant. He died on 1st October, 1890, leaving as his next heir his mother Sigappi, to whom letters of administration to his estate were granted by the Court of the Recorder of Rangoon. She died on 1st December, 1893, and on her death, the next heirs to the estate of Muniandy Mantry were his cousins, Chellum Servai and Muniandy Servai, who were brothers and members of a joint undivided family; and letters of administration of the estate of Muniandy Mantry were granted to Chellum Servai. Muniandy Mantry had during 1888 and 1889 borrowed several sums of money from one Stamps, and had deposited with him the title deeds of the Tankkyan grant as security for the repayment of the debt.

On 28th November, 1891 Stamps assigned the debt to one Arunachellam Chetty who on 18th September, 1895 sued Servai, in the Court of the District Judge of Hanthawaddy, to recover the amount due (Rs. 11,938-12-0). A sale of the grant Chellum Servai had in the meantime on 11th June, 1895, executed a deed purporting to be a sale of the grant to one T. P. Petherpermal Chetty (the appellant) for a consideration stated to be Rs. 10,000 for the grant and four years' arrears of rent due from the tenants. In answer to Arunachellam Chetty's suit it was pleaded that the sale to Petherpermal Chetty, who had no notice of the equitable mortgage, gave him a title free of the incumbrance.

On 3rd January 1896 the District Judge gave Arunachellam Chetty a decree for sale on the ground that on the evidence in the suit Petherpermal Chetty, at the time of the execution of the deed of 11th June, 1895, had full notice of the equitable mortgage and that decree was affirmed on appeal by the commissioner of

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Pegu on 28th March, 1906 and by the Judicial Commissioner of Lower Burma on 26th November 1906 both the Appellate Courts in their judgments expressing doubts as to the *bona fides* of the deed of sale.

Chellum Servai died on 14th June, 1897, and on his death Mal and [illegible] (the plaintiff in the suit out of which the present appeal arose) became entitled to the estate. He was at that time in Madras and did not return to Burma, until about six months later. Petherpermal Chetty then asserted an absolute title in himself to the Tankkyan grant. On 4th June 1897 Munandy Servai applied for letters of administration to such portion of the estate of Munandy Mantry as was unadministered. In his application he challenged the title of Petherpermal Chetty who opposed the application, and by order dated 14th July, 1897, Munandy Servai was referred to the Civil Court to establish his title. After giving instructions for the institution of a civil suit he was induced to refer the dispute to the arbitration of a *panchayet* of certain chetties of his class who decided in favour of Munandy Servai and Petherpermal Chetty agreed to restore possession of the grant and render accounts. Munandy Servai wished to return at once to Madras, so Rs. 1,000 was paid to him on account and the actual delivery of possession and settlement of accounts was postponed, until he returned. He left Rangoon on 30th July, 1897, and early in the morning of that day executed a document at the house of one Maung Shwe Waing. The document purported to be a release of all claims, but at the time of the execution was fraudulently represented by Petherpermal Chetty to be a receipt of the arrangement for restoring the property and rendering accounts.

Munandy Servai returned to Burma about a year afterwards when Petherpermal Chetty declined to give up possession, and set up the document of 30th July, 1897 as a release.

Munandy Servai thereupon, on 24th July 1901 brought the present suit, claiming possession of the Tankkyan grant, and alleging that the deed of sale of 14th June, 1897 was a sham transaction and not intended to be operative, and that the deed of release dated 30th July, 1897 had been fraudulently obtained from him. The defendants were Petherpermal Chetty and two

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persons Muthia Chetty and Chunnu Chetty, to whom he had mortgaged the grant, who were made pro forma defendants, but no question arose on the present appeal as to their rights

The defence was a denial of the plaintiff's allegations, and it was also pleaded that the plaintiff had no right to sue

The judgment of their Lordships was delivered by

Lord Atkinson In this case an action was originally brought by R Muniandy Servai, claiming through his deceased brother Chellum Servai, who was himself heir and administrator of one Muniandy Maistry against T P Pethepermal Chetty, the uncle and predecessor of the appellant hereinafter called "Pethepermal the elder", and two formal defendants, R M A R L Muthia Chetty and P R M P Chunnu Chetty, to recover possession of a certain tract of paddy land about 2,500 acres in extent, known as Government Waste Land No 1, situate in Tammaung Circle, Kungyang in Township, Hanthawaddy district Lower Burma One Arunachellam Chetty claimed to be an encumbrancer on these lands as equitable mortgagee by deposit of the title deeds for a sum of Rs. 14,668-12

On the 11th June, 1892 Chellum Servai executed a deed purporting to be a conveyance on sale of the above-mentioned lands to Pethepermal Chetty the elder, a money lender residing in Rangoon, in consideration of the sum of Rs 30,000, the receipt whereof was thereby acknowledged

On the 18th September, 1900 Arunachellam Chetty, the equitable mortgagee, instituted a suit in the District Court of Hanthawaddy against Chellum Servai, as administrator of the estate of Muniandy Maistry, deceased, and Pethepermal the elder, in which he alleged that at the time of the execution of the above-mentioned conveyance Pethepermal the elder was aware of the existence of the (Arunachellam's) claim as equitable mortgagee, and that the sum of Rs 30,000, the consideration mentioned in the deed, had never been paid, and claimed that he might be declared entitled to hold his equitable mortgage over these lands in priority to the last mentioned conveyance, and that the defendant Chellum Servai might be ordered to pay to him the sum of Rs 14,565-12 with interest, and other relief.

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Petherpermal the elder filed his defence, and the case having come on for hearing, the District Judge decided, amongst other things, that Petherpermal the elder was, at the date of the deed of conveyance to him, well aware of the existence of this equitable mortgage, and declared that the latter was entitled to priority over the former, and ordered the defendant Chellum Servai to pay to the plaintiff the amount of the latter's claim. Thereupon Petherpermal the elder procured a loan from the two formal defendants to the present suit sufficient to enable him to discharge the amount due to Arunachellam Chetty for debt and costs, and as security for this loan, he executed a mortgage of the lands now sought to be recovered. No question has been raised as to the validity of this latter incumbrance.

It is therefore clear that, whatever may have been the design to effect which the deed of the 11th June, 1895 was executed, Arunachellam Chetty, the creditor, was not by it in fact defrauded of his debt. He was paid his debt together with the costs of the litigation, which he successfully prosecuted, and, if his interests were prejudiced at all, it was only to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take.

On the 30th July, 1897, R. Muniandy Servai and Petherpermal the elder, executed a deed of release, by which the former released all his interest in the lands sued for in consideration of Rs. 1,000 paid to him by the latter. The District Judge found that the execution of this deed was procured by a misrepresentation, and declared that its only effect at law was as a receipt for the sum of Rs. 1,000. No objection was taken in the argument on the appeal in reference to the finding on this point.

It was proved by the affirmation of Muniandy Servai given in evidence in this case that the deed of the 11th June, 1895 was executed in order to enable the rent to be collected and paid to the grantors, and "to quash Subramanian's case," *i.e.*, the case of the equitable mortgagee. The District Judge held that it was "a *benami* conveyance" made by the parties to it "in collusion to defeat" the claim of the equitable mortgagee on the lands. The Chief Court of Burma on appeal upheld that decision.

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It was not pressed in argument by Counsel on behalf of the appellant that on an issue of fact such as this, the finding of the Judge, who tried the case and saw the witnesses, approved, as it was, upon appeal, should, under the circumstances of the case be disturbed.

The only questions, therefore, for their Lordships' decision are:—

(1) Is the plaintiff, despite his participation in this fraudulent attempt to defeat his creditor, entitled to recover the possession of the lands purported to be conveyed?

(2) Is his right of action barred by the 91st Article of Schedule II, to the Indian Limitation Act?

Their Lordships are of opinion that their answer to the first question must be in the affirmative.

A *benami* conveyance is not intended to be an operative instrument.

In Mayne's Hindu Law (7th Ed., p. 595, para. 446) the result of the authorities on the subject of *benami* transactions is correctly stated thus:—

"446. . . . . Where a transaction is sure made out to be a mere *benami* it is evident that the *benamidar* absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. The fact that A has assumed the name of B in order to cheat X can be no reason whatever why a Court should assist or permit B to cheat A. But, if A requires the help of the Court to get the estate back into his own possession, or to get the title into his own name, it may be very material to consider whether A has actually cheated X or not. If he has done so by means of his *alias*, then it has ceased to be a mere mask, and has become a reality. It may be very proper for a Court to say that it will not allow him to resume the individuality, which he has once cast off in order to defraud others. If, however, he has not defrauded any one, there can be no reason why the Court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance persons have been allowed to recover property, which they had assigned away. . . . . where they had intended to defraud creditors, who, in fact, were never injured . . . . But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies: *In pari delicto potior est conditio possidentis*. The Court will help neither party. 'Let the estate lie where it falls'."

Notwithstanding this, it is contended on behalf of the appellant that so much confusion would be imported into the law, if

the maxim *in pari delicto potior est conditio possidentis* were not rigorously applied to this case, and, apparently, that the cause of commercial morality would be so much prejudiced, if debtors, who desired to defraud their creditors were not deterred from trusting knaves like the defendant, that in the interest of the public good, as it were, he ought to be permitted to keep for himself the property, into the possession of which he was so unrighteously and unwisely put.

The answer to that is that the plaintiff, in suing to recover possession of his property, is not carrying out the illegal transaction, but is seeking to put everyone, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant, who is relying upon the fraud, and is seeking to make a title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor* v. *Bowers*[1], and the authorities upon which that decision is based, clearly establish this. *Symes* v. *Hughes*[2] and *In Great Berlin Steamboat Co.*[3] are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry L.J., in *Kearley* v. *Thomson*.[4]

Mr. Upjohn contended that, where there is a fraudulent arrangement to defeat creditors, such as was entered into in this case, if anything be done or any step be taken to carry out the arrangement, such as on the trial of an indictment for conspiracy, would amount to a good overt act of the conspiracy, any property transferred by the debtor to his co-conspirator cannot be recovered back. This, however, is obviously not the law. In conspiracy the concert or agreement of the two minds is the offence, the overt act is but the outward and visible evidence of it. Very often the overt act is but one of the many

[1] (1876) L. R. 1 Q. B. D. 291.
[2] (1870) L. R. 9 Eq. 475, 479.
[3] (1884) L. R. 26 Ch. D. 616.
[4] (1890) L. R. 24 Q. B. D. 742.

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steps necessary to the accomplishment of the illegal purpose, and may, in itself, be comparatively insignificant and harmless; but to enable a fraudulent confederate to retain property transferred to him, in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with.

As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th June, 1895, being an inoperative instrument, as, in effect, it has been found to be does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. The 144th, and not the 91st, Article in the second Schedule to the Act is, therefore, that which applies to the case, and the suit has consequently been instituted in time. Their Lordships are, for these reasons, of opinion that the decision appealed from is right and should be affirmed, and that this appeal should be dismissed. They will humbly advise His Majesty accordingly.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Note—If the object of the fraud is not accomplished either wholly or partially, then the person in whose hands the property is, is liable to give up the property to the transferor who attempted the fraud. Where the object of the fraudulent transfer was to deprive another person of specific property, it is accomplished when the transfer is effected and everything is done to give effect to that transfer. *Suryanarayana v. Butchaiah*, 3 L.W. 111 (114-5). See also notes on *Jado Nath v. Rup Lal*, (I. L. R. 33 Calc. 967.) at p. 87 of this book.

The principle of the decision in the leading case is inapplicable to transactions in which the law requires the name of the actual purchaser to be certified in a document by the Court. *Ramaswami v. Pechappier*, 3 L. W. 203.